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REPORTS
OF
CASES DECIDED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES
WITHIN THE
SOUTHERN DISTRICT OF OHIO

HUMPHREY H. LEAVITT
JUDGE

By LEWIS H. BOND
Counselor at Law

VOLUME I

CINCINNATI
ROBERT CLARKE & CO
1872

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PREFACE.

THE liberal encouragement proffered by a number of his professional brethren, in advance of the publication of these volumes, and the assurance of the co-operation of the learned Judge whose decisions are herein presented, induced the Reporter cheerfully to enter upon the labor of preparing them for the press.

The six volumes of Judge McLEAN's Reports include the period dating from his appointment to the bench of the Supreme Court, in 1829, to the year 1855. Since the last-named year, with the exception of decisions occasionally appearing in law periodicals and newspapers, there have been no reports of cases in the courts for the Southern District of Ohio. It occurred to the Reporter that it could not be otherwise than acceptable to the profession to present, in an enduring form, a portion of the numerous cases before Judge LEAVITT from 1855 to the spring of 1871, when he retired from the bench, after his long judicial service. And in this view, the Reporter is gratified in knowing he had the cordial concurrence of many prominent members of the bar with whom he conferred.

After the division of the State of Ohio, in 1855, into two judicial districts, and the establishment of the courts for the Southern District at Cincinnati, there was a rapid increase of business in both tribunals. For a few years prior to the death of Judge McLEAN, in the spring of 1861, his duties in the Supreme Court, and his failing health, prevented his regular

attendance at the terms of the Circuit Court. After the appointment of Justice SWAYNE to the Supreme Court, in 1862, his necessary attendance at its protracted terms, and his duties in other districts of his extended circuit, rendered it impossible for him to give any considerable portion of his time to the court at Cincinnati. As a result of these causes, the labor and responsibility of presiding in the Circuit Court were imposed by law on the District Judge. In addition to his labors there, it was his duty to hear and decide cases in the District Court, and after the adoption of the internal revenue system of the United States they were exceedingly numerous, and frequently involved new and difficult questions. The enactment of the bankrupt act of 1867 greatly increased the previous heavy pressure upon the District Judge. This brief reference is made, preliminary to the statement that it was a physical impossibility for the court to prepare extended written opinions in all the cases before it, which are reported in these volumes.

It was deemed expedient that these Reports should not exceed two volumes. The cases reported comprise but a small portion of the whole number decided by Judge LEAVITT. The Reporter has exercised his best judgment in selecting the cases for publication. His aim has been to include only such as might be of some interest to the profession. He has purposely omitted all the cases arising under the Fugitive Slave act. The abolishment of slavery, and the certainty that it could never again have an existence in this country, rendered the report of such cases altogether superfluous. And for a reason kindred to this, the numerous exciting cases growing out of and connected with the late civil war, with one or two exceptions, do not appear in these volumes. That was an abnormal condition of the country, never, as we may hope, to return again. Some of these cases created at the time a highly excited state of public feeling; but as the exigencies which gave rise to them have passed away, it is deemed expedient not to report them.

With the consent and approval of the Hon. S. S. FISHER, the

learned and laborious reporter of four valuable volumes of Patent Cases, the Reporter of the present volumes has reproduced the decisions of Judge LEAVITT, as reported by Mr. FISHER. If any apology for this were needed, it will be found in the fact that the edition published by him was very limited, and that the work is in the possession of only a small number of the profession.

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REPORTS OF CASES

DECIDED IN THE

CIRCUIT AND DISTRICT COURTS

OF THE UNITED STATES,

WITHIN THE

SOUTHERN DISTRICT OF OHIO.

(CIRCUIT COURT.)

THE UNITED STATES v. NATHAN COONS.

To convict of the crime of perjury, under section 13 of the act of Congress of March 3, 1825, it must be shown by evidence that the defendant was sworn; that he was sworn in a case, matter, hearing, or other proceeding, where an oath or affirmation is required to be taken or administered under or by any law or laws of the United States, and that he "knowingly and willingly" swore to that which was false.

Under an indictment for this offense, the prosecution must establish, by proof, that the oath was administered to the defendant by the person named in the indictment; that such person had authority to administer the oath, and that the defendant swore, with a wicked and corrupt intent, willfully false in regard to the matters alleged in the indictment to be untrue.

The statements of a defendant, which are made the basis of a charge of perjury, must be disproved by two witnesses, or one witness and corroborating circumstances.

Any discrepancy between what the defendant swore to, and what is set out in the indictment as having been sworn to by him, is fatal.

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A commissioner for Ohio and Indiana, appointed by the Circuit Court of the United States in Indiana to take depositions in a case pending in said court, has authority to administer an oath under the laws of the United States.

Confessions of a prisoner should be cautiously received.

The proper evidence of the pendency of a suit is the record of the court.

John O'Neal, District Attorney, for plaintiff.

Thomas Ewing, for defendant.

CHARGE OF THE COURT:

The defendant in this case is indicted for perjury, under section 13 of the act of Congress, approved March 3, 1825, which reads as follows:

"If any person in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury," etc.

The indictment contains one count wherein the defendant is charged with committing perjury on January 18, 1855, at Cincinnati, in the State of Ohio, by swearing to a deposition before Alexander H. McGuffey, a Commissioner for Ohio and Indiana, who had been appointed as such on December 29, 1854, by the Circuit Court of the United States, in the State of Indiana, to take said deposition, to be used in a case then pending in said court, wherein Benjamin A. Earl was plaintiff, and the Madison Insurance Company was defendant. The indictment alleges that the defendant, Nathan Coons, testified in said deposition, among other things, "that Adams Chapin and Lyman Cole, and Filley & Chapin, in the month of December, 1851, and about the first of the month of January, 1852, had only a few sides of sole leather in their store, on

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Pearl street, in Cincinnati, and that they did not then have a great deal of stock on hand, and that about that time he was all through their said store and manufactory, in said city, and they then had little stock of any kind on hand; that they had a small quantity of red sole leather and sheep-skin, but very little of either; that about December 12, 1851, Filley, one of said firm of Filley & Chapin, told him to fill up two boxes, which were standing in said manufactory, with leather chips; that he did so, and that when they were so filled, the said Filley nailed the lids on them and marked on them "Kip boots, No. 1," and the letter "C," and "Louisville, Ky.;" that another person had already filled two other boxes with leather chips, and also filled two more at the time he filled the two boxes at Filley's request, and that when he left the store the said Filley was engaged in nailing up the boxes so filled; that about January 1, 1852, he saw all of these boxes put on board the steamboat "Martha Washington," while she was lying at the Cincinnati wharf, prior to her departure on the trip when she was burnt.

The indictment also contains the following assignments of perjury: 1. That Filley & Chapin, in the month of December, 1854, and in the month of January, 1852, had a large stock on hand in their store, on Pearl street, in Cincinnati. 2. That the said Coons was not about that time in or through their manufactory or store, on Pearl street, in Cincinnati. 3. The said Filley did not tell said Coons to fill up two boxes with leather chips. 4. That the said Coons did not fill any of said boxes with chips. 5. That the said Filley did not nail the lids on any boxes filled with leather chips. 6. That the said Filley did not mark upon any such box or boxes "Kip boots, No. 1," or the letter "C," or any other marks. 7. That no other person filled any of the said boxes with leather chips. 8. That the said Coons did not see any boxes so filled with leather chips put on board the said steamboat "Martha Washington."

To justify a verdict of guilty in this case, the jury must

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be satisfied by the evidence that the defendant was sworn; that he was sworn in a case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, and that he knowingly and willingly swore to that which was false. It must also appear by the evidence that the oath was administered to him by the person named in the indictment, and that such person had authority to administer the oath. The proper evidence of the pendency of a suit between Benjamin A. Earl and the Madison Insurance Company, in the Circuit Court of the United States, in the State of Indiana, is the record of the court. During the progress of the case, the question has arisen, was the commissioner, McGuffey, duly authorized to take the defendant's deposition? The Circuit Court of the United States in Indiana was fully competent to give him such authority. It will be for the jury to say, from the evidence, whether the defendant swore falsely, with a wicked and corrupt intent to falsify in regard to matters alleged in the indictment to be false. The jury will have the defendant's deposition and will compare it with the indictment. There are several distinct assignments of perjury in the indictment, and the defendant can not be convicted except as to matters therein charged. A conviction can not be had on the assignment, respecting the quantity of stock Filley & Chapin had on hand, as the averment of the indictment is, that in December, 1854, and in the month of January, 1852, they had a large amount of stock on hand, while the statement of the defendant, in his deposition, is, that in the month of December, 1851, and about the first of the month of January, 1852, they had but a small amount of stock on hand. Any discrepancy between what the defendant swore to in his deposition, and what is set out in the indictment as having been sworn to by him, is fatal to a conviction. The assignment principally relied on by the prosecution is that respecting the filling up of the boxes with leather chips. Was this statement false?

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It must, to authorize a conviction, be disproved by two witnesses, or one witness and corroborating circumstances. The facts will be for the jury to determine from the evidence. If they believe the defendant to have sworn willfully false in testifying, as alleged in the indictment, it will be their duty to convict. The prosecution relies upon the testimony of the three Chapins and Earl, and have also proved some confessions of the defendant made by him while in jail. Confessions of an accused person should always be cautiously received. The jury are the exclusive judges of the credibility of evidence. It appears from the testimony that the Chapins were implicated in a case arising out of the burning of the steamboat "Martha Washington," and would be affected by evidence which would tend to establish their fraudulent conduct. Earl is a party to a suit against "The Madison Insurance Company," seeking to enforce its liability under a policy insuring this property about which the defendant testified in his deposition. Perjury is an odious crime, and the defendant, if guilty, merits the punishment inflicted by the law; but the jury should weigh well the evidence and act with great deliberation.

The jury returned a verdict of not guilty.

THE UNITED STATES v. SAMUEL LUMSDEN ET AL.

An examining court or judge will not require clear and indubitable proof of the guilt of accused parties, to justify an order that they shall answer further to the charge made against them.

Section 6 of the neutrality act of April 20, 1818, punishing the offenses of beginning or setting on foot, or providing or preparing the means for a military expedition or enterprise for the invasion of a country with which the United States is at peace, is not violated without the commission of an overt or definite act.

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Mere words written or spoken, though indicative of the strongest desire and most determined purpose to do the forbidden acts, will not constitute an offense defined and punished by said section 6.

If the means provided were procured to be used on the occurrence of a future contingent event, no liability is incurred under the statute.

If the intention is that the means provided shall only be used at a time and under circumstances when they could be used without a violation of law, no criminality attaches to the act.

To provide the means for such unlawful expedition or enterprise implies that such means must be actually furnished and brought together for a criminal purpose.

Proof of declarations made by a defendant is admissible to explain or determine the character of acts ambiguous or unintelligible.

Written and printed evidence containing no proof of an overt act, in violation of said section 6, is admissible as confessions and declarations, and to such evidence the rule applies that those parts which admit of an interpretation favorable to defendants must be considered as well as those justifying the implication of guilt.

Corwin & Probasco, and Geo. R. Sage, for United States.

Groesbeck, Piatt, Mallon, and O'Neill, for defendants.

LEAVITT, J.

The evidence in this case being closed, after a very protracted examination, it is my duty to state the grounds of the order I propose to make. And I may premise, that sitting as an examining judge, the sole inquiry is, whether the evidence offered, and the law applied to it, make out such a probable case of guilt as will require the accused persons to answer further to the charge exhibited against them. In stating the conclusion to which I have arrived, it is not my purpose to notice at length all the facts adduced in evidence, or the numerous points made by counsel, in the extended discussion of the case. The duty I am to discharge is purely of a judicial character, and will be performed without any reference to popular opinion, or any outside pressure, which it is alleged has been brought to bear on the case. I should be utterly unworthy of the position I occupy, if these considerations could have the slightest influence on my action.

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It is undoubtedly a sound and well-settled rule, that an examining court or judge will not require clear and indubitable proof of the guilt of accused parties to justify an order that they shall answer further to the charge made against them. Whether thus held, or whether discharged unconditionally, the order is not conclusive. In the former case, the accused is remitted, first, to a grand jury for an inquiry into the facts; and it is only on their affirmation of the charge, by the return of a bill of indictment, that the party can be put on trial before a traverse jury. On the other hand, if the accused party is discharged by the examining officer, it is no bar to a subsequent prosecution for the same charge. If, however, after a full examination of the facts, the court or judge is satisfied, as a fair legal deduction, that no crime has been committed, it is his duty promptly to order the discharge of the party accused. It is the right of the party at once to be relieved from a position involving a suspicion of crime, which may seriously affect, not only his social standing, but his pecuniary interests. And it may be remarked that the healthful and efficient administration of criminal law is not promoted by prosecutions which, in the last resort, fail to produce the conviction of the person accused. As a general rule, such futile prosecutions tend more to the encouragement than the repression of crime.

The affidavit on which the warrant in this case issued was made on the 4th of January last. Twenty persons were included in the affidavit and warrant, of whom thirteen, namely, Samuel Lumsden, Joseph W. Burke, Edward Kenebeck, Bartholomew O'Keefe, David Reidy, Michael Noonan, James Murphy, James O'Halleron, John Hudson, Thomas Tiernan, William G. Halpin, Daniel Campbell, and John M. C. McGroarty, were arrested. The last-named person, on the motion of the counsel for the defense, and by the consent of the counsel for the prosecution, was discharged at an early day in the progress of this examination. The other twelve are now before the court. They are all na-

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tives of Ireland, but naturalized citizens of the United States.

The complaint on which the warrant issued was sworn to by John Powers, a citizen of the United States; and sets forth that the persons named therein, "on or about the 28th day of December, 1855, at the city of Cincinnati, in the Southern District of Ohio, and at divers other times and places within said district, to wit: at sundry times since the 1st day of May, 1854, and at the city of Hamilton, and the town or village of Cummins ville, in said district, did begin and set on foot, and did provide and prepare the means for one military expedition or enterprise, to be carried on from thence against the territory and people of Great Britain, with whom the United States were, and now are, at peace."

It is a fact developed in the progress of this examination, that although the affidavit, on which the warrant is based, was made by Powers, a citizen of the United States, the Hon. Charles Rowcroft, her Britannic Majesty's consul at Cincinnati, has had an active agency in this prosecution. This has been frankly admitted by that gentleman, in the presence of the court. He has advanced a large amount of funds in procuring evidence to sustain the prosecution, and has, in other ways, given it his sanction and support. This has been made the occasion of an assault on Mr. Rowcroft, by the counsel of the accused, characterized by great bitterness and severity. While I can not but regret that the obligations of courtesy were not more closely adhered to by counsel, the position of the gentleman named in relation to the prosecution afforded some palliation, certainly, for the course pursued, and rendered it improper for the court to interpose for his protection. But whether he has or has not transcended his legitimate sphere of official duty in this case, is not a question for the consideration of the court; since its action must depend, not on the conduct of the British consul, but on the facts in evidence and the law applicable to them.

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With these remarks, I proceed to the inquiry, whether the facts proved establish the legal probability of the guilt of the accused parties.

The charge against these defendants is based upon section 6 of the act of Congress of April 20, 1818 (3 vol. L. U. S. 447). It declares "that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, any person so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

In the progress of the argument, frequent references were made to the early executive and legislative history of the country, illustrative of its policy respecting the preservation of its relations with foreign powers with whom we were at peace. In the year 1794, during the second administration of Washington, the attention of Congress was earnestly called to this subject, by the arrogant interference with our national affairs of a diplomatic agent of the French government, threatening to disturb our amicable relations with Great Britain. As the result of this, the law of 1794 was enacted. After some intermediate legislation on this subject, the act of 1818 was passed, repealing all former laws, and embodying in it most of the provisions of the previous acts. Section 5 of the law of 1794 was transferred to, and became section 6 of the act of 1818, before quoted.

In construing this section, the court is not essentially aided by previous judicial decisions. Of the few reported cases arising under it, none seem to have involved the precise questions now before the court. They were decided with reference to the facts in proof, but these facts were of such an unequivocal character as to leave little

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room for doubt that they were overt acts, and were sufficient to justify the conviction of the persons implicated, under the section referred to. But they do not furnish an answer to the inquiry arising in this case, namely, whether the circumstances in proof constitute the offenses of beginning, or setting on foot, or providing or preparing the means for, a military expedition or enterprise, designed to invade a country with which the United States is at peace.

No proposition can be clearer than that some definite act or acts, of which the mind can take cognizance, must be proved to sustain the charges against these defendants. Mere words, written or spoken, though indicative of the strongest desire and the most determined purpose to do the forbidden act, will not constitute the offense. It is true that proof of declarations of this nature, previously made, is admissible to explain or determine the character of acts, otherwise ambiguous or unintelligible; but for any other purpose they have no pertinency.

The language of the section is clear and perspicuous; and yet, as in most statutory enactments, it is referred to judicial discretion to determine what acts shall bring a party within its prohibitions, and incur the guilt of its violation. This discretion, however, must not be arbitrarily exercised, but it is to be controlled by known and well-settled rules of construction. One of these rules, applicable to all penal statutes, is, that they must be construed strictly, and not be so extended in their scope as to include cases not clearly within their terms.

In the case of the *United States v. Sullivan et al.*, to which reference is made in Wharton's Criminal Law, 905, and which has been commented upon by several of the counsel in this case, the learned Judge Judson gives a very clear exposition of the section under consideration. Adopting his views, I will quote some passages from his opinion. It should be premised, however, that the facts involved in the case, tried before Judge Judson, are not given by Mr.

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Wharton in his reference to it; and I do not know the precise case before the court, to which the views stated by the judge were intended to apply. A knowledge of these facts would doubtless make his analysis and exposition of the section more satisfactory and intelligible. I will, however, give some brief extracts from the elaborate opinion referred to.

In the first place, the learned judge says: "Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown, by competent proof, that the design, the end, the aim, and the purpose of the expedition or enterprise, was some military service, some attack or invasion of another people or country, state or colony, as a military force." This remark presupposes that some proof has been adduced that an expedition or enterprise has been begun or set on foot, and is intended to instruct the jury in relation to what must be its character and purpose, in order to subject the defendants to the penalties of the law. He then proceeds: "To constitute a misdemeanor under the law of 1818, there must have been a hostile intention connected with the act of beginning or setting on foot the expedition." In a subsequent part of his charge, the judge defines the terms used in section 6 in these words: "The word expedition is used to signify a march or voyage with martial or hostile intentions. The term enterprise means an undertaking of hazard, an arduous attempt. Begin is to do the first act—to enter upon." And again: "To set on foot is to arrange, to place in order, to set forward, to put in the way of being ready. Then, to provide is to furnish and supply; and to procure the means is to obtain, bring together, put on board, to collect." And subsequently he remarks: "There are four acts declared to be unlawful, and which are prohibited by the statute: 'To begin an expedition, to set on foot an expedition, to provide the means of an enterprise, and, lastly, to procure those

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means.'” He then adds: “As an illustration of what has been said, I will remark that to purchase, charter, repair, or fit up any vessel or steamboat; to procure and put on board such vessel or steamboat powder, ball, fire-arms, military stores, ship stores, or any of them, to be used in any place in contravention of and with intent to violate this act; to enlist, engage verbally, or contract with men, as officers, soldiers, or musicians, to go out on such an expedition as I have defined—may be considered as providing and procuring the means of a military expedition or enterprise.”

No authority can be necessary to sustain the position that the conclusion of guilt, in reference to any of the four alternative acts forbidden by section 6, follows only from proof of some distinctive, substantive fact looking to, and having for its object, a military expedition or enterprise against a country with which our relations are peaceful. Even as to the first and lowest form of offense designated by the statute—that of beginning a military expedition or enterprise—it must be signalized by some overt act. It is true, as to this offense, the statute is very comprehensive in its terms, and was evidently intended to strike at the first inception of any movement which, in its development, might endanger the peace of the country. Still, the beginning to do a thing imports that there must be an act which marks such beginning. It is difficult to form a clear conception of what will constitute such inceptive act. As before intimated, it requires something beyond a mere declaration of an intention to do it. The actual enlistment or enrollment of men, with the purpose of engaging in an unlawful military expedition or enterprise, is clearly within the scope of the first alternative of section 6. This constitutes a substantive fact susceptible of proof; and being proved, would justify the conclusion of legal guilt. It is not material, in this case, to inquire whether the overt act of beginning an unlawful military expedition or enterprise may not be consummated prior to an actual

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enlistment or enrollment of men, by some act of a less equivocal character. Probably a previously concerted movement or arrangement, with a distinct reference to the recruitment of men, would be sufficient to constitute such a beginning. And if this was followed up by the designation of a plan for an enlistment or enrollment, though there should be no proof that any were actually enlisted or enrolled, it would bring the parties implicated within the operation of the section referred to.

But in the view I have taken of the evidence in this case, it is quite unnecessary to consider more critically and minutely the import and construction of section 6. I will proceed, therefore, without further reference to it, very briefly to notice such parts of the evidence before me as bears on the question of the guilt of these defendants in reference to the charges exhibited against them.

And in the first place, I will refer to the documentary or written and printed proofs before the court. These have been put in evidence by the prosecution, and it has been strenuously and forcibly insisted that they show the existence of societies and organizations among the Irish population of this country, the members of which are actuated by strong hostility to the government of Great Britain, and avow it as their purpose and desire to free their native land from British rule, and eventually to establish its independence. It is contended that in the furtherance of this design movements are in progress, with which these defendants are connected, which threaten to interrupt our peaceable relations with Great Britain, and which call loudly for the vigilant enforcement of the neutrality laws of the United States.

The written and printed evidence, it may be remarked, contains no proof of any overt act in violation of the statute, and is competent so far only as it may be supposed to give character to those acts of the defendants which have been proved by the oral testimony. It is competent, in the light of admissions and declarations by which the

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defendants are bound; and viewed in this aspect, the well-known rule applies that it must be taken together, and those parts which admit of an interpretation favorable to the defendants must be considered, as well as those justifying the implication of guilt.

The first item of this documentary proof is the book containing the constitution and minutes of the proceedings of the Robert Emmet Club of Cincinnati, which is a branch of the Irish Emigrant Aid Association of Ohio. The defendants are all members of this club. It is a secret society, every member being required to take originally an oath—now a promise—whereby he pledges himself, in the presence of God, that he “will persevere in endeavoring to form a brotherhood of affection among Irishmen of every religious persuasion,” and that he “will also persevere in his endeavors to uproot and overthrow English government in Ireland.” Then follows an obligation to the effect that, under no circumstances, shall the member disclose the doings of the club, or inform on, or give evidence against, any one belonging to it, etc. It is also in evidence that the club have secret signs or passwords, by which the members are known to one another, and by which they obtain admission to any similar society elsewhere. In their constitution they avow, as one purpose of the organization, the subversion of the British power in Ireland. They also adopt the platform of the Massachusetts society, which has been in existence something more than a year. In that platform there are strong expressions of hostility to England, and of a desire to liberate Ireland from her power; and it avows a determination to pursue a course of action “perfectly consistent with our duty and obligations to America, but tending to ensure the success of the cause of liberty in our native land.” One of the resolutions forming a part of this platform recommends a convention to be held in New York, “for the purpose of carrying out a united system of action throughout the Union and the colonies, and to adopt an

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address to our brethren in Ireland exhorting them to be of good cheer, for their friends in America are up and doing, and that they shall not be left alone in the struggle."

The Cincinnati club was organized on the 4th of September last, and at the time of the arrest of these defendants numbered seventy-three members. By the constitution, every member, upon his initiation, is required to pay one dollar, and afterward, twenty-five cents, monthly.

A printed address, to "The Irishmen of the Buckeye State," dated the 27th of September last, issued in behalf of, and under the direction of this club, has been read in evidence. It is unnecessary to make quotations from it. It is a glowing and fervent appeal to Irishmen to co-operate with the Emmet Club in the purposes of its organization, by the formation of similar clubs throughout the State. And the object of these is avowed to be the achievement of the liberty and independence of Ireland. It does not, however, propose or recommend any course in violation of the neutrality laws of the Union. It was evidently written under the influence of high excitement, and its style is somewhat prurient and hyperbolical; but it does not advise or advocate any military movement in behalf of Ireland. What is said about grasping the liberty of that country with "a strong and armed hand," is evidently a mere figure of speech, and has no reference to any practical military action. Or if such a purpose was in the mind of the writer, he has failed to indicate any time at which it is to be fulfilled, or any specific action by which it is to be effected.

The address and resolutions of the convention of the delegates of "the American-Irish Aid Society," held at New York on the 4th of December last, have also been read in evidence, and referred to in the argument. Samuel Lumsden, one of the defendants, was a member of that convention, as a delegate from the Cincinnati society, and acted as one of its vice-presidents. The defendants, Halpin and Kenefeck, were also present as delegates. I have

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looked over the published account of the doings of that convention; and whatever views may be entertained of the utility and propriety of such a meeting, nothing appears in the proceedings indicative of an unlawful purpose to invade Ireland. While there are some expressions warranting the inference of such a design, upon certain contingencies, an intention to violate the laws of the United States is explicitly disavowed. One of the resolutions declares "that the first duty of all American citizens, whether native born or naturalized, of whatever political opinions, or of whatever nationalities, is to faithfully respect all their obligations of citizenship, arising under the laws and constitution of our country."

But it is quite unnecessary to multiply references to these published documents. It is certain that, giving them a construction the most unfavorable to these defendants and to the objects and purposes of these associations of Irishmen, they do not establish the charge exhibited against them, nor fix upon them the guilt of any violation of the laws of the land. They prove no overt act of military movement or organization, looking to an invasion of Ireland, and bringing them within the provisions of the act of 1818. It is equally clear that neither the book containing the record of the constitution and the proceedings of the Emmet Club of Cincinnati, nor any of the papers offered in evidence, show a breach of any of the criminal laws of the United States. Whatever may be thought of the rightfulness or policy of secret societies or organizations, under our form of government, and the practice of enforcing the supposed obligations of their members by solemn appeals to Deity, whether in the form of oaths or promises, it is certain there is no legal prohibition of such acts. Neither is there any law, state or national, forbidding assemblies of the people for any lawful purpose, or restricting the right of a free expression of opinion, either by speaking or writing.

As the result of the views thus indicated, it follows that

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these written or documentary proofs have no relevancy to the case upon inquiry, except as they may give character to the oral testimony adduced. And I now propose very briefly to consider this testimony, and to state the conclusions to which it leads. To facilitate this inquiry the evidence may be considered, first, as applicable to the charge of beginning or setting on foot a military expedition or enterprise; and second, procuring or providing the means for such expedition or enterprise.

It is insisted by the counsel for the prosecution that the charges under both these divisions are sustained by the evidence.

Three witnesses have been sworn and examined by the prosecution, whose evidence is mainly relied on, so far as oral proof is concerned. These are Powers, Hughes, and Barber. Powers is a native of Pennsylvania. The only facts stated by him, material to notice, are that he was present at a conversation between the witness Barber and Reidy, one of the defendants, near the corner of Western Row and Ninth street, in Cincinnati, in which Barber, alluding to the fact that he had paid money upon his enrollment in a military company, said that the company was not the right one, and that he had been imposed on. Reidy then replied, the Washington battalion was all right, and was bound to go to Ireland. This witness was also outside of the house in which the Hamilton meeting was held, and could hear and see what took place, and testifies that the defendant Burke stated the object to be to form societies, and to collect aid and arms to uproot and overthrow the British government in Ireland, and that some arms and men had already gone. As the witness Hughes states nothing material, it is not necessary to refer specially to his testimony.

The principal witness for the prosecution is Barber. He is before the court under somewhat peculiar circumstances. He is an Irishman by birth. On the 24th of October, for the purpose, as he says, of exposing the doings of the

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Emmet Club, if he found its purpose unlawful, he became a member, and took the oath prescribed, and got possession of the secret signs and passwords. These he communicated immediately to Mr. Rowcroft, the British consul, with whom he conferred, and from whom he received, from time to time, the sum of one hundred dollars. He attended nearly all the meetings of the club, from the time of his entrance into it till these defendants were arrested. He made notes and memoranda of what transpired at those meetings, which he has used on his examination to refresh his memory. This witness has been bitterly assailed by counsel, and denounced as utterly unworthy of credit. Some of his statements on the stand have been directly contradicted, and in some of them he is corroborated by the minute-book of the club and by witnesses. It must be admitted that he is before the court under circumstances suited to create strong doubts of his credibility. It is not important to inquire whether, in so far as he has misstated any facts to which he has sworn, he has willfully and corruptly falsified the truth, or whether from some cause there may not be a perversion of his mental and moral powers, as the result of which he views some subjects through a distorted medium; and thus unconsciously, it may be, to himself, has received erroneous impressions as to the circumstances about which he testifies. However this may be, I am constrained to view his testimony with caution and distrust.

But it may be well doubted whether, if the testimony of Barber is accredited, as to all the facts he states, which are not contradicted by reliable witnesses, the charge against the defendants is sustained. I will advert very briefly, first, to such parts of his testimony as are applicable to the charge of beginning or setting on foot a military expedition or enterprise, premising, as already stated, that nothing short of a previously-concerted agreement or arrangement, or for an actual enrollment or engagement of men, for the purpose of a military invasion of Ireland, will sustain the charge. On this subject the substance of what

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Barber states is, that he enrolled himself in one military company, connected with the Emigrant Aid Society, called the Independent Conohan Guards. The statement concerning this enrollment is exceedingly vague and indefinite. The organization of this company was never perfected, nor is there any evidence that the purpose of getting it up was an expedition against Ireland. Barber also states that Captain Tiernan, one of the defendants, asked him to join a company he was raising to go to Ireland, and that he, Barber, gave Tiernan three dollars for his initiation fee, and five dollars toward buying his uniform. Barber also states that Reidy told him, Tiernan's company was a humbug, and would never go to Ireland, but that his would. This is all the evidence that I am now able to recall, relating to the enrollment of men. And it may as well be stated now that it is inpro of by several very respectable and credible witnesses that the companies to which Barber refers were, or had been a part of the Ohio militia, and had no connection whatever with the Emmet Club, and that the enrollment of which Barber testifies had no reference to a military expedition to Ireland. It also appears that not more than two of the members of the club belonged to any of these companies. The statements of Barber, therefore, fail to make out the proof of an enrollment of men for any purpose in violation of the laws of the United States. As the charge of beginning a military expedition or enterprise is not sustained, the second alternative, that of setting on foot, falls with it, since, as already stated, that imports a stage in the proceeding, resulting from the prior act of beginning, and must be preceded by it.

I am brought now to the consideration of the inquiry, whether there is proof of the providing or procuring the means of a military expedition or enterprise. And I may state here, as a governing rule in the application of the evidence on this point, that any providing or procurement of means, to bring the party within the penal sanction of the law, must have reference to the use of such means, under circumstances that would render such use criminal in the

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eye of the law. If, therefore, the proof shows that means were procured, to be used on the occurrence of a future contingent event, no liability is incurred under the statute. The test of the criminality of the act is the intention; but if the intention is that the means provided or procured shall only be used at a time, and under circumstances in which they could be used, without a violation of any law, no criminality attaches to the act.

I will now inquire what the proof on this point is, according to the statements of Barber, and on the supposition that his testimony is credible. And first, I may remark, that this witness says, on his cross-examination, that he knows of no money paid, or arms procured, for the purpose of a military invasion of Ireland. But it is insisted that he proves a number of isolated facts, which, when brought together, sustain the charge of providing and procuring the means of a military expedition. I will advert very briefly to these facts. Barber says, Burke, one of the defendants, gave him a subscription paper to collect money to aid in purchasing arms or guns for the club to go to Ireland. Burke had previously shown him a shooting-iron, saying it would do good execution in Ireland, and that it was for his company, the Queen City Cadets. Barber also states that Kenefeck, one of the defendants, said at the Cummins ville meeting, that \$5,000 could easily be raised for the expedition, and that 100,000 Irishmen would look well in the morning sun on Vinegar Hill. He also states that at a meeting of the Emmet Club, on the 9th of November, Kenefeck said his instructions from New York were to take arms from this city to Ireland, and that in reply, Lumsden remarked that there was no use in that, for they would be furnished with arms in Ireland. It also appears from Barber's evidence, that at one meeting of the club a proposition in regard to procuring arms was submitted and debated.

It does not appear, however, from any part of Barber's statements, that any funds were ever paid, or that any arms were ever purchased. If his evidence is accredited, there

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was a good deal of talk about raising money and procuring arms, but nothing was ever accomplished in regard to those objects. The facts referred to, therefore, do not prove the charge of providing or procuring any means for a military expedition or enterprise.

But it is proved by Barber (and in this he is corroborated by the minute-book of the club), that the defendant, Samuel Lumsden, at the convention in New York, in December last, offered to subscribe \$1,000 to a fund which it was proposed to raise in aid of the operations of those who were laboring for the independence of Ireland. The minutes of the club show that the thanks of the members were voted to Lumsden for his "munificent offer;" and it is argued that this fact not only implicates Lumsden in the charge of providing and procuring means for a military enterprise or expedition against Ireland, but that all the members who voted for the resolution of thanks made the act their own, and are therefore criminal. I remark, in the first place, that this was a mere offer to contribute money, made, probably, upon some condition which has not been, and never will be, complied with, and which is neither legally or morally binding on the party making it. Again, there is nothing in the evidence to show that the offer of the \$1,000 had any reference to a military descent on Ireland, or any other unlawful purpose. But if it were a criminal act, it was committed in another judicial district, and, therefore, without the jurisdiction of this court. And as to the affirmation of the act by the vote of thanks, whatever might be its effect in a civil suit, in a criminal prosecution it can not be held to implicate the parties thus voting.

Without adverting more minutely to the evidence for the prosecution, I may state, as the result of my deliberation upon it, that I am led to the conclusion it does not sustain the charge against these defendants. But it is proper, however, in order that the whole case may be fully presented, that I should refer to some parts of the evidence adduced by the defense. And first, I refer to the testimony of

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Michael M. Keating, who says that he was one of the founders and first members of the Irish Emigrant Aid Association, and "its object was to unite old and new Ireland for one particular purpose, and that was to get up an American Fontenoy, in the event of trouble between America and England," and that they were careful to do nothing that would compromisethem with this government, or this government with England. This witness heard Mr. Hyde make a stimulating speech to the club, in regard to the probability of a difficulty between the United States and England, and exhorting the members to be ready in that event to aid Ireland. He says, also, that the Emmet Club had nothing to do with any military organization as such.

J. J. Burns, a witness for the defendants, says he is a member of the Emmet Club, and that all the members have been absolved from the obligation of their oaths, so that they could testify freely in this case. He says he is a member of the Methodist Church, and that there is nothing in the principles or constitution of the Emmet Club to prevent a member of any christian church from belonging to it. He was a regular attendant at the meetings of the club. The club has no connection with any military company. A proposition was once made in the club in relation to arms, but the president ruled it out of order. Nothing was ever said in the club about the present difficulties of England in the Crimea, or about taking advantage of the present difficulties between England and Russia.

Edward Dalton testifies that at the Hamilton meeting Burke did not state that the object of the Irish Society was to raise men and arms for the invasion of Ireland. He spoke of an invasion of Ireland, by the Irish of this country, in the event of a war with Great Britain. In this, he directly contradicts Barber.

In reference to the witnesses above named, it may be remarked, they are before the court without impeachment, and without any reason to suspect the truthfulness of their statements. The witness Burns, especially, from his man-

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ner in court, seems to be a man of more than ordinary intelligence; and it is not controverted that he occupies a highly respectable standing in this community.

If the statements of these last-named witnesses are entitled to credence, the proof is clear that the club or association with which these defendants are connected, has not proposed or attempted any military movement, designed either presently or prospectively, for a descent on Ireland. The impracticability of an invasion of that country from the United States, while at peace with Great Britain, and the certainty that any such attempt would result in nothing but disaster to those engaged in it, affords a presumption, at least, that it was not seriously contemplated. And, if there existed in the minds of these defendants any ulterior purpose of such hostile demonstration against that country, it was to be carried out only upon the occurrence of a state of war, and would therefore involve no violation of law.

I have thus hastily noticed what seem to be the material parts of the evidence submitted to the court. Many facts have been developed by the testimony, which are not important, as applicable to the present inquiry. That inquiry is not whether these defendants harbor feelings of deep-rooted hostility to England, and a too ardent desire for the redress of the alleged wrongs of Ireland—not whether, as the result of the almost proverbial warmth and excitability of the Irish temperament, they have been imprudent, or indiscreet in words or actions—not whether their efforts to excite the zeal of their countrymen in the United States may or may not, in its results and developments, prove beneficial to the land of their birth—but whether, from the evidence, there is reasonable ground for the conclusion, that they are guilty of the specific charges against them, or of any other criminal violation of law.

I approve cordially of the policy of our national legislation, for the preservation of our neutral relations with foreign countries, with which we are at peace. It had its origin at an early period of our history, and in the best

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days of the republic. It was adopted upon the recommendation of Washington, the sanction of whose great name is quite sufficient to commend it to the profoundest regard of every right-hearted American citizen. It has its basis in the incontrovertible truth, that our great country will best subserve its true interests, and attain its highest glory, by avoiding all "entangling alliances" and hostile conflicts with other nations. While we may desire, and by all legitimate modes of action, labor for the political regeneration of every oppressed people, and the universal diffusion of the principles of our free government, we should bear in mind that our mission is, emphatically, one of peace. We are not called upon to proclaim and enforce the great doctrines, which lie at the foundation of our incomparable institutions, at the cannon's mouth, and "with garments rolled in blood." It should rather be our high purpose to recommend their recognition and adoption by other nations, by our elevated and enlightened course of action, and by showing with what scrupulous regard the rights and liberties of the people are protected and maintained. It is thus that we shall successfully demonstrate the great truth, that man is capable of self-government, and that constitutional liberty is above all price. Already, our example has produced a marked influence on other nations. And, if we are but faithful to the principles of the great fathers and founders of our government—to the constitution, as the bond of our Union, and the best guarantor of our rights, we shall go on "conquering and to conquer," till the whole earth shall benignly feel the effects of our example. On the other hand, if, from an unhallowed lust of territorial acquisition, and a specious zeal for the propagation of free principles, we become embroiled in dishonorable wars, the aid of prophecy is not needed to announce, with sad certainty, that the sun of the republic will go down in blood, and that the end must be, the establishment of that most abhorred of all forms of government—a military despotism.

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I may be allowed further to remark, that while upon the evidence before me, and the law, which must govern my action, I have no hesitancy in adopting the conclusion that these defendants must be discharged, I am not insensible to the fact, that some of the developments made in the progress of this examination are of a character suited to attract public attention to them. These have been adverted to, and commented upon, by the counsel for the prosecution, with great impressiveness and force. I can not concur with them in the position they urge, that the evidence shows there was the beginning of a military movement or organization, having an immediate reference to the invasion of Ireland, and bringing the defendants within the penalties and prohibitions of the statute. Whatever ulterior purposes they may have had in view, there is a lack of evidence to prove any overt act necessary to constitute the offense charged upon them. Yet, the views and suggestions of counsel, in reference to some of the aspects of this case, are certainly entitled to great consideration. It is true beyond a question, that strenuous and concerted efforts have been made in several of the States of the Union to organize the Irish population into clubs, the members of which are bound by a solemn oath or pledge not to reveal their proceedings, or under any circumstances to give evidence against those who are initiated. Already a national convention, consisting of delegates from these clubs, has been held in the city of New York. The avowed purpose of these movements, I am aware, is to produce unity and harmony of feeling among Irishmen, and prepare them for decisive action in the establishment of the independence of Ireland, in the event of a rupture of the present peaceful relations existing between this country and Great Britain. And doubtless, from a motive of this kind, many Irishmen, who, as adopted citizens of the United States, are loyal in feeling to our government and institutions, have given their sanction to, and aided in, these movements.

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Would it not be well for such to pause, and seriously inquire, whether great mischief may not be concealed beneath this plausible assumption, and whether there may not be those who are laboring to produce excitement on this subject, who have less at heart the restoration of Ireland's liberties, than the promotion of their own interested views? Suppose it be true, as averred, that there is no intention to violate our neutrality laws, or compromise the peace of this country; yet, is there not reason for the apprehension that these agitations will produce, as their results, hostile collisions between this country and Great Britain? Can it be otherwise, than that these constant and exciting appeals to the national animosities and religious prejudices of a portion of the Irish population of this country, are suited in their tendency, if not in their design, to involve us in the bloody conflicts of war?

I censure no Irishman for sympathizing with his native land, and ardently desiring the restoration of the rights of its people; but with all candor and kindness, I would suggest that these feelings ought not to be indulged at the hazard of the interests and peace of the country of his adoption. That country has freely conferred on all foreigners the rights of citizenship, and extends to them the guaranties of its constitution and laws. In return for these privileges, may it not reasonably be insisted they shall in all respects be loyal to our government? There can be no such thing as a divided national allegiance. The obligations of citizenship can not exist in favor of different nationalities at the same time. The foreigner who takes the oath of fidelity to our government necessarily renounces his allegiance to all others; and the obligation thereby incurred abides upon him so long as he remains within the limits of the country, and enjoys the protection of its laws. And it is an obligation that is paramount to all others, and demands of him who assumes it a course of conduct that shall be free from the suspicion of un-

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friendliness to the institutions and interests of the country, which he is solemnly pledged to defend.

In closing, I have only to remark, that it is in proof that several of these defendants have been long residents of this city, and occupy a highly respectable standing in this community. I should most reluctantly adopt the conclusion, that in the transactions in which they have been implicated, they were moved by any design to violate the laws of the country, or entertained any purpose inconsistent with their duty and obligation to it, as adopted citizens. I trust there will be no future developments, which will present the charge, from which they are now relieved by the decision of this court, in any different legal aspect from that which it now assumes. But, I may remind them, as already intimated, the order for their discharge from this complaint, will be no bar to its re-investigation, if, in the progress of events, such a course should be deemed necessary.

The defendants are discharged.

(CIRCUIT COURT.)

JOSEPH M. WAYNE v. JAMES B. HOLMES.

The requirement of the statute, in reference to certainty and definiteness in the directions for constructing a machine for which a patent is sought, has in view two distinct objects. The one is, that the public may know precisely what the invention is; the other, that, upon the expiration of the patent, they may have an unerring guide in the specification or record in the Patent Office in the construction of the patented machine.

In a patent for an improvement in the manufacture of wash-boards from wood and metal combined, by sharpening the cutting edges of the zinc, or other metal, and incising the edges by pressure into the frame, it is not a material defect in the specification that it does not give the precise angle of the cutting edge, or describe the mode of applying the pressure, or the depth of the incision.

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If competent mechanics, skilled in the business, testify there would be no difficulty in constructing the machine from the specification and drawing, the assumption of vagueness and uncertainty in the description is repelled, unless it clearly arises from the language used by the patentee.

The originality and novelty of the patentee's invention being denied in this case, it is incumbent on the defendant to rebut the presumptions of the patent by proof that it was not the invention of the patentee, or was previously known and in use.

If the jury find that the improvement patented was not new and original with the patentee, the patent is a nullity.

Evidence that others, prior to the date of the patentee's application, have made trials and experiments on the principle of his patent, which were not successfully carried out, will not defeat the patent.

If the jury are satisfied that the patentee, or the plaintiff as his assignee, has surrendered or abandoned the invention to the public, there can be no recovery for an infringement.

If the jury find the patented improvement is new and original, and that the defendant has infringed, their verdict will be the *actual* damage which the plaintiff, as assignee of the patent, has sustained by such infringement; and this is to be ascertained by the number of wash-boards made on this principle, and the increased profit to the defendant arising from the use of the invention.

In computing the damages, the jury should exclude from their computations the increased facilities in making wash-boards, due to inventions of machinery since the patent, or its assignment to the plaintiff.

THIS was an action on the case, tried before a jury, to recover damages for the alleged infringement of letters patent granted to Orin Rice, October 30, 1849, and assigned to plaintiff January 15, 1851, for an improvement in wash-boards.

The claim of the patent was as follows: "Having thus fully described the nature and effect of my invention, I wish it to be distinctly understood that I do not claim any of the several parts composing a wash-board made of sheet metal and wood; but that which I do claim as my new and useful improvement in the mode of manufacturing such wash-boards, and for which I ask letters patent, is incising with the edges of the sheet metal (prepared and

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crimped as described) the legs, or the legs and body board, by the suitable application of pressure thereto, thereby fitting and attaching the one to the other at one operation, and with a comparatively water-tight joint."

Miner & Oliver and T. Ewing, for plaintiff.

C. D. Coffin, for defendant.

CHARGE OF THE COURT:

This suit is brought to recover damages for an alleged infringement of the exclusive right of the plaintiff to make and vend the improved wash-board, patented to Orin Rice, October 30, 1849, and assigned by Rice to the plaintiff January 15, 1851.

It is not denied by the defendant that he has made and sold these improved wash-boards; but he insists that the patent is invalid; *first*, on the ground of the uncertainty and insufficiency of the specification affixed to, and constituting a part of, the patent; and, *second*, that Rice was not the original and first inventor of the improvement patented to him, and that the same was known and in use prior to the date of his application for a patent.

The question arising on the first ground stated is a question of law for the decision of the court. It involves this inquiry, whether the patentee has made known, with sufficient certainty and precision, what his invention is? If he has failed to do this, it is clear that his patent can not be sustained, and this action must fail. A patent right is the creature of the statute, and has no validity unless the statute has been substantially complied with. The sixth section of the act of Congress of July 4, 1836, now in force, provides that "before any inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable

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any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, or use the same; and in case of any machine, he shall fully explain the principle and the several modes in which he has contemplated the application of that principle, or character, by which it may be distinguished from other inventions."

In his specification, the patentee describes his improvement as follows:

"The nature of my invention consists in the mode of manufacturing wash-boards out of metal and wood combined, by so preparing the sheet of zinc, or other metal, that by sharpening two parallel edges, and crimping the sheets from one of these edges to the other, I am enabled, by using pressure, to incise and fasten, to the wooden sides, the sheet thus prepared."

In a subsequent part of the specification, the mode of constructing the wash-board is more fully described, in the following words:

"The process by which I effect these improvements consists in taking a sheet of zinc, dividing it into strips of the width desired, and sharpening to a cutting edge the sides that are to incise the wooden standard of the frame, and thereby attach the one to the other, when they are properly brought together; so that by the application of pressure, the sheet is buried to a suitable extent, not only fast and firmly to the wood, but so aptly that it forms a water-tight joint," etc.

And it is also stated, that "the metal and wood being thus exactly and instantly adapted, fitted, and closely joined the one to the other, by machinery expressly prepared for the purpose, the article can be furnished to the market at fifty per cent. less cost."

The specification refers to drawings, which accompany it, and which exhibit minutely the different parts of the wash-board, and the method of its construction.

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It is objected to this specification, that it does not comply with the requisites of the statute in not stating fully the patented invention, and the mode of the construction of the wash-board. The specific points taken by the counsel for the defendant are, that the specification is defective in not setting out the method of sharpening the edges of the zinc, and the precise angle of the sharpened edge; and also, in not stating the depth of the incision required, or the method of applying the pressure by which the zinc is incised.

If it be true, as insisted, that the patentee has failed to describe any material part of the process of making a wash-board, on his improved plan, necessary to the full benefit of his invention, and this omission is apparent from the specification, it is fatal to the patent. In giving a construction to this specification, it will be obviously proper that the whole should be taken together; and, if from the entire instrument, the true nature of the improvement, with the mode of carrying it out, is disclosed, it will be deemed to be a substantial compliance with the statute. Another rule is equally obvious, namely, that in the description of the improvement, and the directions for constructing the improved machine, it is not necessary to state those matters, which it is apparent would be proper or indispensable in its structure. This would involve what the statute designates as "unnecessary prolixity," which is to be avoided in a specification. Applying these rules to this specification, I have failed to perceive any such omissions as will invalidate this patent. It is expressly stated that the zinc is to be sharpened to a "cutting edge;" and it was not necessary to describe the process by which the zinc was to be thus cut, or to state the precise angle of the cutting edge. These would suggest themselves readily to any mechanic of ordinary intelligence in the construction of the wash-board. There are many modes by which these ends could be accomplished with equal ease and utility; but no particular mode being

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claimed as a part of the discovery of the patentee, it was not essential to describe any. The same remark applies to the depth of the incision required. The specification directs that the sharpened edges of the zinc are to be buried to "a suitable extent" in the sides or legs of the board. A mechanic could not fail to know, that for the purpose of self-incision, the sharpened edge must extend but a short distance beyond the board on which the plate of zinc is fixed. It is equally clear, that it was not necessary to describe the precise mode of applying the pressure by which the zinc is forced into the wood, and the different parts of the board fastened together. In the first part of the specification, the patentee says, the use of pressure, to incise and fasten the zinc to the sides, is necessary; and in the directions for making the wash-board, in a subsequent part of the specification, it is distinctly stated, that the application of pressure is needed for this purpose, and reference is made to a machine that might be constructed to accomplish the result. But clearly, it was not necessary to state the precise method of applying this pressure, or the principle in mechanics to be used in its application. Any kind of pressure, applied in any way, would accomplish the desired purpose; and this may well be presumed to have been known to the patentee, or to any mechanic, who might be called on to construct the improved wash-board.

I can not see, therefore, that there is any such omission, or vagueness in the specification, apparent on its face, as requires the court to pronounce it a nullity. It is, however, a question for the decision of the jury, upon the evidence before them, whether it describes the mode of constructing the wash-board with such clearness and precision, that a mechanic of reasonable intelligence, and skill in that branch of art, could carry the invention into practice. This is a question of fact, and must be settled by the judgment of persons having practical knowledge in such matters. The requirement of the statute, in reference to certainty

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and definiteness in the directions for constructing a machine for which a patent is sought, has in view two distinct objects. The first is, that the public may know precisely what the invention is; and the other, that upon the expiration of the patent, they may have an unerring guide in the construction of the patented machine, from the specification on record in the patent office.

Several witnesses have been inquired of whether, from the specification and the accompanying drawings, the improved wash-board, patented by Rice, could be constructed? They have all replied affirmatively to this question. One witness, a practical machinist, states that he had no difficulty in making a wash-board from the directions contained in the specification, in connection with the drawings. He says explicitly, that there is no necessity that the specification should state the mode of cutting or sharpening the zinc, or of applying the pressure for the incision of the edges of the zinc. No testimony has been offered by the defendant to prove that there is any difficulty in making the board from the directions given in the specification.

The next inquiry relates to the novelty and originality of this improvement. As already stated, one of the grounds of defense in this case is, that the improvement patented by Rice was not new, but was known and in use before the date of his application for a patent. If this defense is sustained by the evidence, the patent to Rice has no validity, and no one is responsible for the use of the improvement. The statute requires that the patentee should be the original and first inventor. This implies that the improvement patented was the discovery of the patentee, and not borrowed from another; and also that it was not before known or in use. In a word, it must have been original with the patentee, and not known to others.

It may be remarked here, that there is a legal presumption in favor of the originality of a patented invention or discovery arising from the patent. As preliminary to its emanation, it is required that the applicant shall make oath

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that he is the original and, so far as he knows, the first inventor. And, in the absence of evidence to negative this presumption, it will be sufficient to sustain the patent. In the present case, the plaintiff has proved the originality of the invention by Rice, the patentee. Having assigned the patent, he has now no interest in it, and is a competent witness. It is the province of the jury to determine as to the credit due to his evidence. He states that the improvement in the wash-board for which he obtained a patent, was his own invention. And there are some facts in proof, by other witnesses, in relation to his declarations and conduct, anterior to his application for the patent, tending to prove that the invention was original with Rice.

The novelty of the invention presents the more important and difficult question for the decision of the jury. As before intimated, under the patent laws, if the patented invention was known or in use, or something substantially and essentially like it, prior to the application for a patent, the proof of the fact is an answer to an action for an infringement. In such case, the patent is void, and no action can be sustained for its violation.

The defendant has introduced several witnesses to prove the prior use and knowledge of wash-boards, made on the self-incising plan, patented by Rice. I shall not detain the jury by referring minutely to the statements of these witnesses. Mr. Gilson testifies that he has been engaged in the business of manufacturing wash-boards, at different places, since the year 1836; and that, as early as 1839, he made them on the plan of incision by mechanical pressure. It is not clear, however, that this witness made any without, at least, the partial use of grooves, in the sides and legs of the board. He also states that, from the low rate at which the boards were made, upon Rice's plan, he was compelled to abandon the business, when they were introduced to the public. Another witness, Barrett, states that he saw wash-boards in the State of Maine, some fifteen years since, made by sharpening the zinc, and forcing it into the sides by

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means of a clamp. The witness, Janes, testifies in substance that, in 1846, being in the employment of Mr. Babcock, at Cincinnati, he made from six to ten boards by sharpening the edges of the zinc and forcing them in by pressure. In an affidavit made by Janes in 1849, which is admitted in evidence, he states that after leaving Babcock's employment, he made three wash-boards on the same plan, and gives the names of the persons for whom they were made. From the testimony of Mr. Bailey, a witness for the plaintiff, it appears that two of these boards have been found, and, upon examination, it is ascertained they were not made on the plan of self-incision, but that the edges of the zinc were let in by mortises. Janes states in his deposition in this case, and which is before the jury, that he was under a mistake in swearing, in his affidavit, that the three boards made, above referred to, were on the self-incising plan. He, however, repeats the statement that those made by him while in Mr. Babcock's employment were made in this way. The witness, Babcock, corroborates, to some extent, the testimony of Janes, in relation to the boards made for him. He did not see Janes in the act of making the boards, nor did he take them to pieces to ascertain how they were made; but has no doubt they were made on the self-incising plan. He says he did not like these boards, and no others were made for him in that way. On the part of the plaintiff, it is in evidence, by several witnesses who have dealt for many years extensively in wash-boards, both in the East and in the West, that they never saw or knew of any on the self-incising plan till Rice's were introduced into the market.

Such is the summary of the evidence on the question of the novelty of this invention. It will be for the jury to say which way the scale preponderates. They must be reasonably certain that the invention patented by Rice was known before he applied for a patent, to justify a verdict which will invalidate it. And proof of prior experiments on the principle of this invention, if not carried on to completion,

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does not make out the fact of prior knowledge or use, within the meaning of the patent laws. The machine or structure alleged to be similar to that patented, must have been so far perfected as to be of practical utility. And if abandoned after experimental trials as useless, a presumption would arise that the alleged invention was not identical with one subsequently patented to another person, the merits and utility of which are proved by its general use and admitted superiority over all others.

Every invention, under our patent laws, must be "useful," as well as original and new. The patent implies that the invention is of some utility, but this may be rebutted by evidence that it is frivolous and of no practical value. In this case, it would seem, from the evidence, there can be no doubt of the utility of the invention. Although simple in its character, and not importing the exercise of a high degree of mechanical or scientific talent, it is nevertheless useful, and within the scope and policy of the patent laws. It is clearly proved that the wash-board, made pursuant to this patent, is superior to any before in use; and for this reason, and on account of the reduced price at which it can be made, it has superseded all others. An intelligent witness has stated that, without the aid of the machine for pressing the zinc into the sides and nailing the boards, patented since the date of Rice's patent, his invention has the advantage over any other in the proportion of twelve to one. The same witness testifies that with the aid of the machine referred to, with steam power, one hundred dozen wash-boards can be made in a day, at an actual cost of one dollar and sixty-eight cents the dozen.

It is proper here to notice, that it is insisted by the defendant's counsel, as a ground of defense in this action, that the plaintiff, as the assignee of the patent, has virtually abandoned all his rights under it, and can not, therefore, recover damages for an infringement. If this position is sustained by the evidence, it is clearly a good defense to this action. The owner of a patent has an undoubted

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right to surrender it to public use. And if the evidence satisfies the jury that there has been such surrender, the plaintiff can not recover. The evidence on this point is briefly this: That, owing to doubts as to the validity of the patent, a number of persons in Cincinnati were engaged in the manufacture of wash-boards on the plan of Rice's improvement; and that shortly prior to the commencement of this suit, and when it was in contemplation, a meeting was held of all these persons, including the plaintiff. After conference on the subject of the price of the wash-board, an agreement was entered into and signed by all the parties, to the effect that thereafter no one would sell the wash-boards below a certain price agreed on, and stated. This agreement was published in one of the city papers. This, it is urged in argument, is a virtual consent, on the part of the plaintiff, that others should make these improved wash-boards, and a waiver of all claims for the infringement of the patent. In reference to the conference and agreement adverted to, the witness, Bailey, states that he was then interested in the patent, with the plaintiff, and was present at the meeting, and a party to the agreement as to prices to be asked for the wash-boards. He testifies that the sole object of the proceeding was to prevent the prices from running down so low as to exclude any profit from the manufacture of the wash-boards; and moreover, it was distinctly stated, and so understood by the parties, that the plaintiff, in signing the paper referred to, waived no right to which he was entitled as the assignee of the patent. If the jury give credit to this testimony, there is clearly nothing in this transaction justifying the conclusion that the plaintiff has abandoned any right or claim which vested in him under the patent.

If the jury find for the plaintiff on the points to which their attention has been directed, it will be their duty to assess such damages as he may be entitled to recover. An infringement of the exclusive right of a patentee, or his assignee, implies a right to sue for and recover damages

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for the injury. The general rule of damages is the amount of profits made by the person infringing the patent from the unlawful use of the improvement. On the theory of the patent laws, this measures the loss sustained by the owner of the patent. There may be circumstances of aggravation attending the infringement, that will justify a jury in returning damages beyond the amount of profit derived from it; but there are no facts in this case requiring the application of this rule. In the progress of the trial, the plaintiff offered to prove the aggregate of profit made by all the manufacturers of the improved wash-board in violation of his exclusive right, insisting that the defendant was liable for a *pro rata* share of this entire profit, but the court excluded this evidence from the jury as not furnishing a proper rule of damages. The jury will therefore take into consideration the evidence of the number of wash-boards made by the defendant, and the profit derived from such manufacture; and this will be the proper basis of their verdict, if they find the plaintiff is entitled to damages. It was insisted by the defendant, that in estimating the amount of the damages, the jury should exclude from their consideration the increased facilities for making the wash-board, due to the machines invented since the date of Rice's patent for pressing and nailing the wash-board. It is in evidence that there are two of these in use, constructed on somewhat different mechanical principles, the effect of which is greatly to expedite the process of manufacturing these wash-boards. The specification connected with Rice's patent expressly refers to a machine to be used for the purpose indicated; and it seems clear, that in estimating the profit to the manufacturer derived from Rice's improvement, reference may be had to the use of such a machine.

The jury found a verdict for the plaintiff, assessing the damages at \$500.

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EX PARTE ROBINSON, U. S. MARSHAL. HABEAS CORPUS.

Section 7 of the act of Congress of March 2, 1833, authorizes any judge of the United States to issue the writ of habeas corpus where an officer of the United States is imprisoned "for any act done, or omitted to be done, in pursuance of a law of the United States."

It is the proper remedy where a marshal is imprisoned by the sentence of a State judge, as for a contempt in not producing the bodies of certain persons named in a writ of habeas corpus issued by such judge, and if it appears from the evidence that such persons were legally in the custody of the marshal, pursuant to the provisions of the fugitive slave act, and that his refusal to produce them before the State judge was a paramount duty by the terms of the said act, the marshal is entitled to his discharge under said section 7 of the act of 1833.

In ordering his discharge upon a habeas, a judge of the United States does not assume a jurisdiction to review or reverse the sentence or judgment of the State judge, but merely exercises a power expressly conferred by an act of Congress.

Although the authorities are not uniform as to the right of a State judge to issue the writ of habeas corpus, where the imprisonment is under the authority of a law of the United States, it is well settled that when the fact is proved that the imprisonment is under such authority, the jurisdiction of the State judge is at an end, and all subsequent proceedings are *coram non judice*.

Ketchum and Headington, for the marshal.

Cox and Jolliffe, in opposition to the discharge.

LEAVITT, J.

The facts which it is material to notice in the decision of the question before me are, that on the 28th of January last, one Gaines, a citizen of Kentucky, on his affidavit that certain colored persons, owing him service in said State, had escaped to the State of Ohio, obtained a warrant from John L. Pendery, a commissioner of the Circuit Court of the United States for the Southern District of Ohio, directed to the marshal of said district, requiring him to arrest said

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persons as fugitives from labor, and have them before said commissioner forthwith; in obedience to which warrant, on the 30th of January, the marshal made return that he had arrested the said persons and had them before said commissioner. On the 9th of February, and while the investigation before the commissioner was pending, he issued his warrant to the marshal, requiring him to commit the alleged fugitives to the jail of Hamilton county for safe keeping, to be produced from time to time, as required; and they were duly committed to said jail in pursuance of such warrant. On the 21st of February, on the petition of one Jesse Beckley, alleging that said persons were unlawfully detained in custody by the marshal of said district, a writ of *habeas corpus* was issued by the judge of the Probate Court of Hamilton county, requiring the marshal to have them before said judge forthwith, with the cause of their caption and detention. On the 28th of February, the commissioner adjudged the said fugitives to be the property of said Gaines, and ordered them to be delivered to him, to be removed to the State of Kentucky. On the same day, the said Gaines made his affidavit that he was apprehensive that said fugitives would be rescued by force, and required that they should be delivered to him in the State of Kentucky by the marshal, pursuant to provisions of the act of Congress. They were delivered to the claimant by the marshal, according to said request.

On the 27th of February, the marshal appeared before the judge of the Probate Court of Hamilton county and submitted, by his counsel, a motion to dismiss the writ of *habeas corpus* issued by said judge, which motion was taken under advisement, and an order was entered by the judge that the marshal should not remove the persons named in the writ from the jurisdiction of the court till the final decision of the motion, which order was served on the marshal on the 28th of February.

On the 1st of March, a motion was again made to dismiss the writ of *habeas corpus*, which was overruled by the pro-

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bate judge, who entered an order requiring the marshal to make a return of said writ on the 7th of March. And on that day the marshal, protesting against the jurisdiction of the probate judge, made his return to the writ of *habeas corpus*, in which he set out the proceedings before the commissioner upon the claim of said Gaines, and avers that at the time of the service of the writ of *habeas corpus* on him he held the persons named in it in his custody, under the order of the commissioner, as before noticed, by virtue of his office as marshal, and by authority of law; and that on the said 27th of February, when he appeared before the probate judge and made his motion to dismiss the writ of *habeas corpus*, and when the order of that date was made by said judge, as before stated, he held said persons in his custody by virtue of his office as marshal, and by authority of law, and that afterward, upon the demand of said claimant, delivered them to him in the State of Kentucky.

On the 8th of March, the question as to the sufficiency of the marshal's return was argued before the probate judge, who continued the same for advisement till the 18th of March; and on that day decided that said return was insufficient, for the reasons that the persons named in said writ of *habeas corpus* were not produced before him, and that the marshal, after the service of said writ, and after the order that the persons named therein should not be removed from the jurisdiction of the court, had removed them to the State of Kentucky.

The probate judge thereupon adjudged the marshal guilty of a contempt of court, and ordered that proceedings should be instituted against him for such contempt. And on the said 18th of March, specifications were filed against the marshal, embodying the charges for contempt. At the same time a rule was entered requiring the marshal, within two days from the service thereof, to show cause why he should not be attached and punished for such contempt. This rule was served on the marshal, and that officer filed

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his answer, setting forth that the acts complained of as a contempt of said Probate Court were done or omitted in the discharge of his duties as marshal of the United States for the Southern District of Ohio, and in pursuance of the laws of the United States: and he again denied the jurisdiction of said court to hold him accountable for said acts. To this answer a replication was filed by the prosecuting attorney of Hamilton county, setting forth that the acts of the marshal were not done or omitted in the discharge of his duties as such officer, nor in pursuance of the laws of the United States.

On the same day the probate judge decided the answer of the marshal was insufficient, and adjudged him guilty of a contempt of that court, and ordered that for such contempt he should be fined in the sum of three hundred dollars and costs, and be committed to the jail of Hamilton county. A commitment was immediately issued by the Probate Court, and pursuant thereto the marshal was seized and lodged in jail.

And on the same day the marshal presented his petition to me, setting forth under oath the facts connected with his imprisonment, averring that he was unlawfully detained in custody, and praying for a writ of *habeas corpus* directed to the sheriff of Hamilton county. The writ was accordingly issued, and has been duly returned by the sheriff; and the marshal, by his counsel, now moves for his discharge from custody.

The *habeas corpus* in this case, issued pursuant to the seventh section of the act of Congress, passed March 2, 1833, which provides "that either of the justices of the Supreme Court or a judge of any District Court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, when he or they shall be committed or confined on or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States, or any

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order, process, or decree of any judge or court thereof, anything in any act of Congress to the contrary notwithstanding."

It is insisted by the counsel who oppose the discharge of the marshal that this provision of the act of Congress applies only to the case of a federal officer who is confined or imprisoned by State authority under an unconstitutional State law; and reference is made to the historical fact that the act of 1838 was passed to meet the then existing exigency growing out of the threatened opposition of one of the States of the Union to the national legislation for the imposition and collection of duties on imports. To this it may be replied that whatever may have been the peculiar circumstances under which the act passed, the section above quoted is still in full force, and obligatory as a law of the United States. And it may be fairly inferred that while its purpose was, at the date of its passage, to provide against a great danger then pending, it has been deemed expedient that it should be continued as a remedy against nullification in any form in which it might be presented.

But this point is not now for the first time presented for decision. It has been settled by eminent judges of the highest official position. In the case of *ex parte Jenkins*, 2 Wallace, Jr., 531, Judge Grier, of the Supreme Court of the United States, granted a writ of *habeas corpus* under the statute referred to, and released the person who applied for it, without the intimation of a doubt as to the authority it conferred. And in the well-known *Rosetta case*, which occurred about a year since, Judge McLean granted a writ of *habeas corpus* under the same provision of the statute, and released the marshal from custody under circumstances very similar to those involved in the case now before us.

The only inquiry, therefore, arising in the present case is, whether, from the facts proved, it sufficiently appears that the imprisonment of the marshal was "for any act done or omitted to be done in pursuance of a law of the United States." If this inquiry is answered affirmatively, it will

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follow that he is entitled to his discharge, as the precise case contemplated by the statute in that event is presented.

In the consideration of this question, it is not necessary to inquire whether the probate judge could rightfully issue the writ of *habeas corpus*; neither is it necessary that this court should assert or exercise a power of revising or reviewing the sentence of the probate judge for the indefinite imprisonment of the marshal for the alleged contempt. Indeed, such a jurisdiction is distinctly disclaimed. But if the conclusion is warranted that the judgment against the marshal was for an act done or omitted, in the discharge of official duties, and under the authority of a law of the United States, an obligation is imposed on me, from which I can not shrink.

It has been before stated that the writ of *habeas corpus* from the probate judge issued the 21st of February, and that the decision of the commissioner, adjudging the fugitives to be the property of the claimant, was made on the 28th of that month. Between these dates the fugitives were in the custody of the marshal, under the process of the commissioner, and it was undeniably his duty to hold them, subject to the final action of the commissioner. Simultaneously with the decision on the claim of the owner, he made oath, pursuant to the provisions of the ninth section of the act of Congress of September 18, 1850, that he had good reason to apprehend a rescue of the fugitives. This section provides that when such oath is made, "it shall be the duty of the officer making the arrest to retain such fugitive in his custody, and to remove him to the State whence he fled, and there to deliver him to said claimant by his agent or attorney." It is clear, from this provision, that the duty of keeping the fugitive in custody, after the decision of the commissioner, if in favor of the claimant, is as imperative as it is while he holds him under the warrant or order of that officer.

With the obligation of this stringent and to him paramount law resting on him, was the marshal bound to obey

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the process of the probate judge? It would seem there was no intention on the part of the marshal to treat that judge with contemptuous disregard. He first appeared before him, and by his counsel exhibited all the facts as to the apprehension, custody, and disposition of the fugitives, submitting at the same time a motion for the dismissal of the writ of *habeas corpus*. This motion was overruled, and the marshal was required to make a return to the writ. He then presented an answer, couched in respectful terms, stating the reasons why he could not produce the bodies of the fugitives. Was this in contempt of the authority of the probate judge? The marshal states in his answer, duly sworn to, that in his conduct he was governed by what he regarded his duty under the constitution and laws of the United States. He was an officer appointed under the constitution, which he had sworn to support, and which declares "that this constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the *supreme* law of the land, and the judges in every State shall be bound thereby, anything in the constitution and laws of any State to the contrary notwithstanding."

Now, if the marshal in good faith, and acting under what he regarded as an imperative obligation resting on him by virtue of a law of the United States, did or omitted to do the acts for which he is imprisoned by the sentence of the probate judge, is he not entitled to be discharged from imprisonment under the express provision of the act of Congress before referred to?

In the *Rosetta* case, before noticed, this same marshal refused to obey a writ of *habeas corpus* issued by a State judge, commanding him to produce the alleged fugitive before him, on the ground that such fugitive was in his custody under process from a commissioner of the United States court; and for such refusal he was arrested by a warrant issued by the judge as for a contempt. On application to

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Judge McLean, that learned and distinguished judge issued a *habeas corpus* to bring the marshal before him, and, after argument and full consideration, discharged him from the custody of the State officer, under the act of Congress already quoted. Judge McLean, in his published opinion, says: "The marshal omitted to do the act ordered to be done by the honorable Judge Parker, because it would be in express violation of his duty under an act of Congress. This is literally within the act." With the knowledge of this adjudication, in a case involving the same principle as in the *habeas corpus* issued by the probate judge, is it strange the marshal should have pursued the same course which had received the sanction of the eminent judge referred to? In the case decided by Judge McLean, the act omitted to be done was the bringing of the alleged fugitive before Judge Parker under a *habeas corpus*; and in the present case, it is the failure to produce the fugitives named in the *habeas corpus* before the probate judge.

The same principle had been previously settled by the decision of the learned judge, before referred to, in the case of *Norris v. Newton et al.*, 5 McLean, 92. He says, in the opinion of the court in that case: "I have no hesitation in saying that the judicial officers of a State under its own laws, in a case where an unlawful imprisonment is shown by one or more affidavits, may issue a writ of *habeas corpus*, and inquire into the cause of detention. But this is a special and limited jurisdiction. If the plaintiff, in the recaption of his fugitive slaves, had proceeded under the act of Congress, and made proof of his claim before some judicial officer of Michigan, and procured the certificate which authorized him to take the fugitives to Kentucky, these facts being stated as the cause of detention would have terminated this jurisdiction of the judge under the writ. Thus it would appear that the negroes were held under the federal authority, which, in this respect, is paramount to that of the State. The cause of detention being legal, no judge could arrest and reverse the remedial proceedings of the

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master." Judge McLean, adds: "And the return made by the plaintiff being clearly within the provisions of the constitution, as decided in the case of *Prigg v. Pennsylvania*, and the facts of that return being admitted by the counsel for the negroes, the judge could exercise no further jurisdiction in the case. His power was at an end. The fugitives were in the legal custody of their master, a custody authorized by the constitution, and sanctioned by the Supreme Court of the Union." And again, in the same case, the learned judge says: "The legal custody of the fugitives by the master being admitted, as stated in the return on the *habeas corpus*, every step taken subsequently was against law and in violation of his rights."

There is another high authority in support of the position that in cases arising under an act of Congress the power of the federal officers is paramount to that of the States. I refer to the charge of Judge Nelson, of the Supreme Court of the United States, to the grand jury of the Circuit Court of the United States for the Southern District of New York, reported in the appendix to 1 Blatchford, 685. That learned judge, admitting the right of a State judge to issue a *habeas corpus* for one in custody under federal authority, adds that "when it is shown that the commitment or detainer is under the constitution or a law of the United States, or a treaty, the power of the State authority is at an end, and any further proceedings under the writ is *coram non judice* and void. In such case, that is, when the prisoner is in fact held under process issued from a federal tribunal under the constitution or a law of the United States, or a treaty, it is the duty of the officer not to give him up, or to allow him to pass from his hands in any stage of the proceedings. He should stand upon his process and authority; and if resisted, maintain them with all the powers conferred upon him for that purpose."

Authorities of the same import could be greatly multiplied, but it is unnecessary to adduce more. If judicial decisions are entitled to any consideration, it is clearly estab-

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lished that, though it may be competent for a State judge to issue the writ of *habeas corpus* in a case of imprisonment under the authority of a law of the United States, when the fact is made known to him, his jurisdiction ceases and all subsequent proceedings by him are void.

Is it supposable the marshal was ignorant that the law had been thus settled by some of the ablest judges of the country, and was he guilty of a willful contempt in deferring to these high authorities? He might well conclude that when the probate judge became apprised of the fact that the fugitives were in custody under a law of the United States his jurisdiction ceased, and that the obligation was imperative on him, under no circumstances to permit them to be taken from his custody.

In the case of *ex parte Jenkins*, before referred to, Judge Grier uses this language: "Neither can such fugitive, when in custody of the marshal, under legal process from a judge or commissioner of the United States, be delivered from such custody by means of a *habeas corpus*, or any other process, to answer for an offense against the State, whether felony or misdemeanor, or for any other purpose."

There is no doubt as to the result if the marshal had placed these fugitives in the custody of the probate judge, in obedience to the writ of *habeas corpus*. The opinion of that judge, as published, on the question of the sufficiency of the marshal's return, shows clearly what his action would have been if the marshal had produced the fugitives. In that opinion he held that the proceedings before the commissioner, by which the fugitives were held in custody of the marshal, were unconstitutional and void. Although it was decided by Judge McLean, in the *Rosetta case*, that it was competent for Congress to vest in commissioners appointed by the circuit courts the powers conferred on them by the act of 1850, and that they could, therefore, legally and constitutionally exercise those powers, and although the same decision had been made by several other judges of the Supreme Court, the probate judge held otherwise, and that the

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acts of the commissioner were mere nullities; and it would necessarily result from this decision that the process by which the fugitives had been arrested was void, and that they were illegally in the custody of the marshal. I do not refer to this with any purpose of arraigning the conduct or impeaching the motives of the probate judge, but in proof of the fact that obedience to this writ by the marshal would have resulted in the discharge of the fugitives.

In the *Rosetta case*, before referred to, the judge held that a State court could not interfere with the officers of the United States in the performance of their duties, under the act of 1850, and that although the fugitive in that case had been discharged by *habeas corpus*, such discharge was no bar to the subsequent proceedings by the commissioner.

As stated in a previous part of this opinion, I neither assert nor exercise the jurisdiction to review or reverse the action of the probate judge. The authorities to which I have referred have been cited in support of the proposition that the law of the United States, under which the marshal acted, was paramount in its obligation upon him; and that, if that officer is now in custody for obedience to that paramount law, the case is within the express terms of the act of 1833, and he is entitled to his discharge.

The *Passmore Williamson case*, decided by the Supreme Court of Pennsylvania, and relied upon in the argument to prove that the marshal ought not to be discharged on this application, did not present the question arising in this case, and is not, therefore, an authority in point. The facts in the case referred to were, that Williamson had been adjudged guilty of a contempt of the District Court of the United States for the Eastern District of Pennsylvania, on an allegation that he had made a false return to a writ of *habeas corpus*, directed to him by said court. While in confinement, under the judgment of the District Court, application was made to the Supreme Court of the State for his discharge on a *habeas corpus*. The ground on which the discharge was urged was, that the court by which Williamson was com-

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mitted had no jurisdiction, and that its sentence was therefore a nullity. The Supreme Court held that, on general principles, they had no power to inquire into and reverse the judgment of a court of another jurisdiction, and refused to discharge the applicant. The case before me stands on wholly different grounds, and does not raise the question decided by the court in Pennsylvania. The interposition invoked in behalf of the marshal is, by virtue of a statute of the United States, intended for the express purpose of relieving the officials of the national government from imprisonment for the performance of duties enjoined on them by law. As before remarked, it is solely under this statutory provision that this court can take cognizance of this application and grant the discharge which is sought for.

In attempting to state briefly the conclusions to which I am brought in the consideration of this case, I have not deemed it necessary to notice all the views presented by the counsel resisting the motion for the discharge of the marshal. One of them has insisted, with much zeal and earnestness, that the fugitive slave law, on which proceedings in this case are based, is, in its most essential requirements, unconstitutional and void, and can not, therefore, form the basis of any valid action by any court or officer of the government. I can not take time to examine and refute this position, but will suggest, what will be most obvious to those who view the subject dispassionately, that a proper appreciation of my position and the obligations resting upon me will make its fallacy and unsoundness sufficiently apparent. The act referred to, whatever views may be entertained of its necessity and expediency, is a valid and constitutional law, and as such must be respected and enforced. No judge or other officer of the State or national government, or any citizen of either, so far as the rights of others are concerned, has a right to act on his private and individual views of the policy and validity of laws passed in conformity with the forms of the constitution. Until repealed or set aside by

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the adjudication of the proper judicial tribunal, they must have the force of laws and be obeyed as such. Any other principle must lead to anarchy in its worst form, and result inevitably in the speedy overthrow of our institutions.

The petitioner is discharged.

(CIRCUIT COURT.)

THE UNITED STATES v. ROBERT J. CROW.

On the trial of an indictment for abstracting a letter or package from the mail, the most satisfactory evidence that it had been in the mail is that of the person who deposited it in the post-office; and of its loss, that of the person to whom it was addressed, to the effect that it was never received by him.

In the absence of any direct testimony connecting the defendant with the violation of the mail, collateral circumstances tending to his inculpation are admissible in evidence to the jury.

Evidence having been introduced showing that a letter had been mailed at Carlisle, in the State of Pennsylvania, addressed to parties in Ohio, inclosing a draft or bill, the prosecution, for the purpose of proving that the draft or bill had been in the defendant's possession, and to raise the presumption that he had stolen it from the mail, offered in evidence a letter purporting to have been written and signed by Martin Smith, transmitting the draft or bill to a banker in Marietta, Ohio, to be cashed, and proposed to prove by a witness that said letter was in the handwriting of the defendant; and the witness stated that it was his impression and belief that the handwriting of the letter, including the signature of Martin Smith, was the proper handwriting of the defendant; but having sworn that he had never seen the defendant write but once, and had no other means of knowing his handwriting, the court instructed the jury that the proof of the handwriting was not sufficient, and would not justify a verdict of guilty.

Proof of the previous good character of the defendant, and that without compulsion he sought an investigation of the charge is not only admissible, but should have weight with the jury if the evidence implicating him creates a reasonable doubt of his guilt.

H. J. Jewett, District Attorney, for plaintiff.

Johnson & Carroll, for defendant.

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CHARGE OF THE COURT:

The indictment against the defendant contains several distinct charges, one or more of which must be substantiated by the evidence to justify a verdict of guilty. The first, second, and third counts are for stealing letters and packages from the mail of the United States without any particular description or designation of them. The fourth count charges the stealing of a letter from the mail, which had been deposited in the post-office at Carlisle, in the State of Pennsylvania, written by R. M. Henderson, addressed to J. D. & J. Brown, Amesville, Ohio, which, it is averred, inclosed a draft in favor of said Browns, drawn by the cashier of a bank at Carlisle on one of the banks of Philadelphia. The fifth count charges the defendant with having fraudulently taken from the post-office, at Beverly, Ohio, a letter addressed to one Martin Smith.

These several charges are based on different provisions of the laws of the United States, designed for the protection of the mails and the punishment of persons guilty of violating them. The case for the prosecution rests wholly on circumstantial evidence, which, it is insisted by the counsel for the government, must lead the jury to the conclusion that the defendant is guilty. It is proper here to remark, that to justify the conviction of the defendant the jury must be satisfied, not only that the mail has been violated, but that the letters or packages, with the stealing of which the defendant is charged, had been in, and were taken from, the mail of the United States. The usual, and certainly the most satisfactory, evidence that a letter or package was put into the mail for transmission, is that of the person who deposited it in the post-office; and the best evidence of its loss is that of the person to whom the letter or package was addressed. In this case neither the person mailing the letter or package, nor the person to whom it was directed, have been called as witnesses; and the jury are therefore to consider whether other circumstances in proof connect the defendant with the criminal acts charged.

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It will not be necessary to recite at length the testimony of the witnesses for the prosecution, which it is claimed proves the guilt of the defendant. I will refer only to the more material facts relied upon for this purpose. The witness, Harvey Smith, says that about the 4th of May last he was informed that some letters and fragments of letters and envelopes had been found under a school-house, in the village of Plymouth, Washington county, Ohio. Upon examination he found some mutilated letters, with envelopes and postmarks upon them. And he identifies some of these now presented to the jury as being the same that were found under the school-house. This evidence proves that there was a violation of the mail of the United States at the place mentioned, but there seems to be no proof directly implicating the defendant with such violation.

It is insisted, however, that the evidence establishes the fact that the defendant was in possession of the draft or bill described in the fourth count of the indictment, and that until he shows that he came honestly into the possession he must be presumed to have stolen it from the mail. It will be for the jury to inquire and determine, first, whether the evidence sufficiently proves the fact of the possession of the draft by the defendant; and, secondly, whether, if in possession, he abstracted it from the mail. On the last point, I may as well remark here that, though the jury may have sufficient grounds for finding the fact of possession in the defendant, they must also be satisfied that it was feloniously stolen from the mail to constitute his guilt under this indictment. If he came, even feloniously, into the possession of the draft by other means than stealing it from the mail, the offense would be one cognizable in a State court, but of which this court has no jurisdiction.

It is an important inquiry for the jury, whether there is sufficient proof that the draft was in the possession of the defendant. For, it will be obvious, if the draft be proved to have been in his possession, in connection with the fact that it was inclosed in the letter from Carlisle, addressed to

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the Browns at Amesville and sent by mail, a *prima facie* case of guilt against the defendant would seem to be made out. And it would be necessary for him to repel the presumption of guilt by proof that he obtained possession of the draft by other means than those charged in the indictment.

The evidence mainly relied on by the prosecution to show that the draft had been in defendant's possession, is that of George Benedict, who swears that on April 17, 1855, he took from the post-office at Marietta a letter addressed to him, purporting to be written by Martin Smith, dated the 14th of April, which contained the draft in question, with a request that Benedict would cash the draft and remit the proceeds to the writer. The envelope of this letter is produced to this witness, and he identifies it as being the same that covered the letter received from Smith. The postmark shows that it was mailed at Amesville. The witness, Benedict, swears that he remitted the proceeds of the draft in bank-notes, inclosed in a letter addressed to Martin Smith. He thinks there were two \$50 notes on Wheeling banks, and that the rest was in Ohio notes.

¶ It is insisted by the prosecution that the letter purporting to be written and signed by Martin Smith was written by the defendant, and is, therefore, conclusive evidence that the draft had been in his hands, and that he resorted to the trick of transmitting it to Benedict for the purpose of getting it cashed, under the feigned name of Martin Smith, that he might reap the proceeds of his crime without danger of detection. It is, therefore, a most important inquiry for the jury whether the defendant wrote the letter to Benedict under the name of Martin Smith.

The only witness for the prosecution to show that this letter was in the handwriting of the defendant is Harvey Smith, who swears that it is his impression and belief that the letter is in the handwriting of the defendant. He does not swear positively on this subject; and on cross-examination the witness says he never saw the defendant write but

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once, and that was at an election, where he wrote some tickets. The letter in question has been permitted to go to the jury, and they are to decide whether it was written by the defendant. It is the duty and the province of the court, however, to state the law on this subject to the jury. Now, it is undoubtedly true that proof of handwriting is often a most reliable species of evidence, and is admissible as such both in civil and criminal cases. But to entitle it to any consideration, the witness who testifies to the handwriting of another must have had adequate means of becoming acquainted with it, and must be able to swear to it with some degree of positiveness. He must have seen the person write frequently, or must otherwise have obtained a satisfactory knowledge of the character of his writing. It is not enough that he has seen the person, as is the proof in this case, write but once, and then under circumstances showing that the attention of the witness was not specially directed to the peculiarities of the penmanship. It would be dangerous, in a criminal case, to rely on such vague and unsatisfactory evidence as the basis of a verdict which will subject the accused to severe punishment and operate as a perpetual brand of infamy on his character.

If the jury are of the opinion that the letter inclosing the draft addressed to Benedict was not written by the defendant, or that the evidence as to that fact leaves it in doubt whether he was the writer, they will inquire whether there are other facts in proof which satisfactorily establish his guilt. Apart from the alleged possession of the draft, there is no evidence that the defendant has been in possession of anything which was taken from the mail. It is stated by one witness, Mr. Faris, that some short time after the receipt of the proceeds of the draft the defendant requested him to change a \$50 bank-note on the Merchants and Manufacturers' Bank of Wheeling. And this fact is relied on as sustaining the inference that this was one of the notes remitted by Benedict in the purchase of the draft sent to him by the person calling himself Martin Smith.

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There is no proof, however, identifying this as one of the notes sent by Benedict. It will, however, be for the jury to give such weight to this evidence as it may be fairly entitled to. If the note exchanged by Faris, at the request of the defendant, was one of the notes sent in Benedict's letter addressed to Smith, it would undoubtedly be a fact strongly implicating the defendant, and which, unexplained, would be sufficient to warrant the inference of his guilt.

As to the fifth count of the indictment, charging defendant with having unlawfully and fraudulently taken Benedict's letter addressed to Martin Smith from the post-office at Beverly, to which it was directed, there seems to be no satisfactory evidence. Indeed, the only fact relied on to establish this charge is that before noticed, namely, that the defendant had the possession of a \$50 Wheeling bank-note. For the reason already adverted to, the jury will no doubt hesitate in giving much weight to this fact.

The case is submitted to the jury, with the remark that it will be their duty to give the defendant the benefit of the evidence adduced by him to prove his previous good standing and character in the community in which he lived. Several respectable and intelligent witnesses have testified directly and positively to his good character, and their evidence on the point is not impeached or contradicted. It is also a fact brought to light by the evidence, that some months after this transaction, and when it was made known to the defendant that he was suspected of having stolen from the mail, though then in the distant State of Missouri, he immediately returned to his former residence in Ohio, and courted a full investigation of the charge. This, with the proof of his good character, is entitled to the consideration of the jury, unless the evidence of guilt is so clear as to leave no reasonable doubt in their minds.

The jury returned a verdict of not guilty.

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(DISTRICT COURT.)

ULYSSES P. SCHENCK ET AL. v. STEAMBOAT FREMONT.

In a suit for collision, to entitle the libellant to a decree for full damages for the injury, it must appear not only that the respondents' boat was in fault, but that the libellants' boat committed no error which contributed to the collision.

An up-going boat has a right to choose which side of the down boat she will take, and to signal accordingly, but has no right to insist on this rule when its observance will render a collision probable.

As a general rule, the proper place of a down boat is in the main channel. Where there is mutual fault, by the well-settled rule of maritime law, there must be a division of the damages; and such is the decree in this case.

Lincoln, Smith & Warnock, for libellants.

Fox & French, for respondents.

OPINION OF THE COURT:

The case set out in the libel is, substantially, that before daylight, in the morning of January 5, 1855, the steamer Switzerland, with a cargo on board, and a loaded barge in tow on the larboard side, was proceeding on a voyage from Cincinnati to New Orleans, and that a short distance above the town of Ghent, in Kentucky, and when near the Kentucky side of the river, the steamboat J. C. Fremont was seen to leave the wharf-boat at the town of Vevay, on the Indiana side, and soon after, instead of passing up near the shore of Vevay Island, crossed the river toward the Kentucky side, and in thus crossing, came in contact with the barge of the Switzerland, striking it on its starboard quarter, carrying away the forward part of its bow, causing it to take in water rapidly, injuring its lading, disabling it from proceeding, and thereby occasioning great injury to the libellants, in the expense incurred in repairs, damage to the cargo, and the

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detention of their boat. It is averred in the libel that the loss and injury thus sustained, was caused wholly by the fault, negligence, and want of skill of those in charge of the said steamer Fremont, and that no fault is imputable to those intrusted with the management of the Switzerland and the barge connected with it.

The respondents aver, in their answer, that the Fremont was proceeding from Louisville to Pittsburg; and, that having landed at the town of Vevay, for the transaction of its business there, started out from the wharf-boat of said town, and crossed the river, to near the Kentucky side, and then proceeded up the river, near the shore, the usual place of an ascending boat, at that stage of water; and that while thus going up, the Switzerland, with a barge in tow on the larboard side, was seen coming down on the larboard side of the Fremont, and continued that course till within one hundred and fifty yards of the said boat, when the Switzerland changed its direction toward the Kentucky shore, and thus proceeding, the barge struck the larboard bow of the Fremont, thereby breaking its planks, timbers, etc. The answer alleges that the collision took place about half a mile above said town of Ghent, the Fremont then being in the proper place of an ascending boat, and that it was due wholly to the improper navigation of the Switzerland, without any fault on the part of the said Fremont.

This brief statement of the material allegations of the libel and answer is sufficient to show the matter in controversy in this case. It also shows that the claims of these parties, as to the facts involved, are so directly in conflict that they can not be reconciled, and wholly exclude the supposition that both are consistent with truth; and, as is almost proverbially common in suits growing out of marine collisions, each party has been successful in sustaining by evidence the assumptions set up respectively in the pleadings. Thus the court is presented with a case, in which the evidence, as to the more essential facts, is palpably con-

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tradictory and discrepant. Under such circumstances, the duty devolving on a court of fixing on a satisfactory basis for a decree is not always easy or pleasant.

It may be premised, that in the consideration of the facts of this case, the conclusion is readily reached that the collision in question could not possibly have occurred without fault of one or both of these boats. On whatever other ground it may be placed, it is certain it can not be attributed to inevitable or unavoidable accident. Indeed, it is hardly possible to conceive of circumstances in which a collision was less necessary, or less excusable. This conclusion fairly follows from facts not in controversy in the case. The libellants' boat, coming in at the head of Vevay Island, was distinctly seen by the pilot of the Fremont; and the latter boat was as distinctly seen by the pilot of the Switzerland, being then in the act of putting out from the wharf-boat, at Vevay. The boats were first mutually seen a little after five o'clock in the morning. The night had been light and fair, but it had become somewhat cloudy toward morning, still it was not so dark but that the boats could be easily seen. The distance between the points where the boats became mutually visible did not exceed two miles, and was probably not more than a mile and a half. An island, the lower end of which is nearly half a mile from the Vevay wharf-boat, stretches up close to the Indiana side of the river, and is something more than one mile in length. The shores, both on the island and the Kentucky side, are nearly straight, so that there is hardly any noticeable bend in the river, and nothing to intercept the view from the Vevay wharf-boat to the point where the Switzerland came in view, at the head of the island. About one-third the distance down, from the head of the island, the river is, by actual measurement, four hundred and fifteen yards in width, and gradually widens, till, at the lower end of the island, it is four hundred and ninety-two yards. At the time of this collision there was nine or ten feet water in the river; and from the Vevay wharf to the

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head of the island, there was but little variation in the depth across from near the island shore to the Kentucky side. The proof is conclusive, that along either shore, or in the middle of the river, there was sufficient depth of water for the safe navigation of these boats. And it is equally clear, that between the points indicated, there is no obstruction or impediment of any kind. The channel, or that part of the river between the island and the Kentucky shore, having the swiftest water, is one-third or one-fourth the width of the river from the latter shore, or, measured by yards, the distance varies from something upward of one hundred to one hundred and fifty. But, as before noticed, the water is deep on either side of the channel, along and near to both the island and Kentucky shores.

Yet, under circumstances so favorable to the safe passage of boats on this part of the river, and which would seem almost to exclude the possibility of a collision between a descending and an ascending boat, the Switzerland's barge and the Fremont were brought into violent contact, and injury, direct and incidental, has been sustained to a considerable amount. And now the inquiry which presents itself is, whether this injury is attributable solely to the faulty management of one of these boats, or do the facts warrant the conclusion that both are in fault. As already stated, the claim of the libellants is for compensation for the whole of the injury sustained by them, and this claim is based on the theory that their boat was not in fault, but that the injury resulted wholly from the careless and unskillful navigation of the Fremont; and, if the evidence sustains this position, the maritime law will afford the redress sought for. But, to justify a decree on this basis, it is not enough that the libellants prove a want of caution, vigilance, and skill in the management of the respondents' boat. It must appear that those intrusted with the management of the libellants' boat are free from censure, and have done nothing which may be supposed to have contributed essentially to the disaster. As promotive of the

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great interests of navigation and commerce, the maritime law is stringent in its requirements of caution and skill in the management of boats and vessels. And a party who has failed to comply with these exactions presents no sufficient ground to recover the entire damages resulting from a collision.

In the consideration of this case, I do not propose to notice minutely, the great mass of evidence which has been introduced. I will merely advert to such prominent features of the transaction involved, as seem to indicate, with sufficient certainty, the decree which should be pronounced.

The evidence of the parties, in some essential particulars, as to the course and navigation of these boats, from the time they were seen by the pilots of each, is in such direct conflict as to render any attempt to harmonize it entirely futile. Seven witnesses for the libellants, including the pilot and others who were on their boat, substantially agree in these statements, that the Switzerland, according to the usual course of navigation for a descending boat, came near to the Kentucky shore, at the head of Vevay Island, and continued down that shore, at a distance from it, variously estimated at from thirty to sixty-five yards, without any variation of course, to the place of the collision. These witnesses also concur in saying, that the Fremont, when first seen, was starting out from the Vevay wharf-boat; and that it proceeded up on the Indiana side, in the direction of the foot of the island, and kept near the island shore, about one-third the length of the island, and then changed her course nearly straight across the river, and in the crossing, struck the bow of the barge about fifteen feet from its stern, nearly at right angles. They also agree in saying the barge was on the larboard side of the Switzerland, and so fastened to it, that the bow projected thirty-five or forty feet forward of the steamer's bow; and that the blow of the Fremont cut off the forward part of the barge, causing the water to flow in freely, and parting the lines by which it was fastened to the steamer. The testimony of these

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witnesses, as to the course of the two boats before the collision, and their relative positions when it took place, is corroborated substantially by four other witnesses, some of whom were on the Vevay wharf-boat, and some on the deck of a steamer lying there when the Switzerland came in view at the head of the island, and who testified that they noticed the course and movements of both boats up to the time of the collision.

On the part of the respondents, four witnesses who were on the Fremont, among whom are the pilot and mate on watch at the time, state, in substance, that on putting out from the wharf-boat at Vevay, the steamer did not go up to or near the foot of the island and along the island shore, but crossed almost straight across to the Kentucky side, and straightened up within fifteen or twenty yards of the shore, nearly opposite an old mill, which is only two hundred yards above a line drawn straight across from the wharf-boat. They also say the Fremont kept up that shore, without any change of course, to the place of the collision. And the pilot says the Switzerland, when the boats struck, was pointed toward the Kentucky shore.

This evidence, given by the respondents, sustains the allegation of their answer, but it is clearly disproved by the libellants' evidence, before referred to. Unless this evidence is arbitrarily repudiated, it must be held as conclusively established that the Fremont did not cross directly from the wharf to the Kentucky side, and was not near that shore when he signaled for it, but was making a crossing a little above the foot of the island, in such a way as almost unavoidably to cross the path of the down-going boat, and necessarily to incur the hazard of a collision.

The usual course of navigation for an ascending boat, starting from the Vevay wharf-boat, as proved by a number of experienced and intelligent river navigators, unless business requires a straight crossing from the wharf-boat, is to go up to near the foot of the island, and then along and near to the island shore, about one-third or one-half the length

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of the island, and then to wear out gradually toward the Kentucky side. These witnesses state that the water is deep along the island, and there being little or no current, is preferred by up-stream boats. Same witnesses, however, say this course is not universally pursued. It would seem, however, to be the proper course for an up-going boat, when a boat was seen coming down from the head of the island. And if the Fremont had been thus navigated, it is certain no collision would have happened.

It is insisted, however, that by the acknowledged law of the river, it is the right of the up-going boat to choose which side of the river it will take, and therefore it was the right of the pilot of the Fremont to cross to the Kentucky side. This rule is affirmed by the board of supervising inspectors, under the act of 1852, in case the ascending boat gives the signal required to notify the descending boat of his choice. But it is very clear no pilot has a right to insist on this rule when its observance would incur the hazard of a collision. It has always been a paramount law of navigation that no circumstances will justify a course of action that must necessarily, or even probably, lead to such a result. Hence it is a part of one of the rules adopted by the supervising inspectors that "no vessel shall be justified in coming into collision with another, if it be possible to avoid it."

Without pursuing this subject further, I must conclude, from the weight of the evidence before me, that the Fremont was wrong in attempting to cross the river in front of a down-coming boat. It is proved that those having charge of this boat were informed at the Vevay wharf-boat that the Switzerland was expected about that time, and was to land there. When the Fremont left the wharf, the other boat was in view at the head of the island. The distance between the boats, when first seen, did not exceed two, or at most, two and a half miles. The Switzerland, it is proved, was running at a speed of about ten miles an hour, and the Fremont at about seven miles an hour. The added velocity

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of the two boats would therefore be seventeen miles an hour, or nearly at the rate of a mile every three minutes. Supposing the distance from the head of the island, where the Switzerland was first seen, to the Vevay wharf-boat, to be two and a half miles, the boats would pass each other in something less than five minutes. But if, as the weight of the evidence proves, the Fremont started across a short distance above the foot of the island, making allowance for the distance the other boat would get down while the Fremont was reaching the point at which it started across, the boats must have been then very near each other. Now, it is in evidence by a witness, to whom entire credit is due, that it is never safe for a boat to cross the path of a down boat, if the two boats are at a less distance than two and a half miles apart. And he states it as his uniform practice, when wishing to cross the river, with a descending boat in view within the distance above stated, to lie to till the boat has passed. This course is the safe and prudent one, and its observance would avoid the possibility of an accident by collision.

The conclusion that the Fremont was pointed toward the Kentucky side, and not straight up the river, at the time of the collision, is greatly strengthened by the above proof that the bow of the steamer struck the barge nearly at right angles. Such is the statement of several witnesses who saw the collision, and such is the inference to be drawn from the nature of the injury which the barge sustained. This is further inferable from the fact that after the barge was struck, and parted from the boat by the force of the blow, the Switzerland, having still some headway, struck the Fremont on its larboard side, abreast of the boilers. This would indicate pretty clearly that the Fremont must then have been quartering across the river, and not straight with it.

I can not, therefore, hesitate in the conclusion that the pilot of the Fremont committed a great error in attempting to cross the river before a descending boat. It was wholly

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unnecessary, and apparently without excuse. That it was a principal cause of the collision is clear beyond controversy.

But it is insisted that the Switzerland was also in fault in not coming down in the channel of the river, that being the proper place for a descending boat, and that this error contributed to the collision which occurred. In the consideration of this part of the case, I shall not advert to the evidence in relation to the signals given by these boats. This evidence is involved in such obscurity and doubt by the contradictory statements of the witnesses, that it is impossible to arrive at any satisfactory conclusion as to the facts. And if it is clear that the pilot of the Switzerland committed a culpable error in putting his boat in the wrong place, it is not, perhaps, material to ascertain what signals were given, or the order in which they were made. By the well-understood usages of the river, applicable, certainly, wherever the river is wide and affords a sufficient depth of water for its entire width, the place of a descending boat is in the channel, or that part where the current is the strongest. This is the rule sanctioned by the supervising inspectors, and is, in itself, reasonable. If, then, it is admitted that the Switzerland gave the first signal, indicating the purpose of the pilot to go down on the Kentucky side, it would seem, under the circumstances of this case, that he was asking what he had no right to claim. The width of the river opposite Vevay Island has already been stated, as also the fact that there was sufficient depth of water anywhere between the island and the Kentucky shore. The evidence is that the channel is about one-third or one-fourth of the width of the river from the Kentucky shore. For about half the distance down the island the channel would be from one hundred to one hundred and thirty yards out from that shore, and toward the lower end of the island, where probably the collision took place, from one hundred and thirty to one hundred and sixty yards out. Now, it is beyond all controversy that at the time of the collision the distance of the boats from the Kentucky shore did not exceed thirty yards.

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Without noticing the other testimony as to this point, there is one fact which seems to settle it beyond doubt. That fact is, that immediately after the collision, and as the result of the striking of the bow of the Switzerland against the Fremont, the latter boat was forced on to the shore, or so near to it that some of the crew jumped off without the aid of a plank. This could not have happened on any other supposition than that the boats were in close proximity to the shore. Several of the libellants' witnesses state the distance at from thirty to fifty yards, while those on the Fremont put it at twenty-five or thirty yards.

It results from this view, that when the collision occurred the Switzerland was about one hundred yards from the proper place of a descending boat. And it seems clear that this was such an essential departure from the settled rules of navigation as to justify the inference that there was a want of due vigilance, care, and skill on the part of those having the management of this boat. It is not excused by the fact that there was a barge in tow on the larboard side, as the evidence is that although it would be convenient to go down close to the Kentucky shore, to afford more room for rounding to at the Vevay wharf, there is no positive necessity for it, and it does not form an exception to the known and settled usages and rules of navigation.

There is another aspect of this case to which I will very briefly refer, which, in my judgment, affords a ground for the inference that there was a want of caution and care in the management of these boats which properly subjects both to liability for the injury sustained by this collision. It has been before remarked that the evidence in relation to the signals given is so conflicting and unsatisfactory as to preclude the possibility of knowing the truth in regard to them. After a very critical examination of the evidence, I confess I have not been able to reach any conclusion on this subject. There are, however, some general views which may be pertinently stated in reference to this

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part of the case, and from which the inference of mutual culpability in these boats may be fairly deduced. And, in the first place, I may remark that no omission of any act necessary to avoid a collision is justifiable. Notwithstanding the almost inextricable confusion in which the evidence has placed this case in reference to the signals, there are still grounds for the conclusion, either that all the signals given were not heard, or, if heard, were not understood by the pilots, respectively, of these boats. It was, then, obviously the duty of both, having reasonable grounds even for a suspicion that there was any misunderstanding or misconception on this subject, at once to have stopped their engines, or, if the case required it, to have backed, until they should know with certainty the safe course to pursue. These precautions were not observed by either of these pilots. If, as the libellants claim, the Fremont improperly started across the river, with the apparent purpose of crossing in front of the Switzerland, the pilot should instantly have stopped and backed. The distance then separating the two boats was such that this measure would most certainly have avoided a collision. The pilot of the Fremont, having reason to believe his signals were not heard, or not understood, and seeing the other boat persisting in her course, should also have stopped and backed. Now, although it is in proof that both boats did reverse their engines, it was when they were so near as to render a collision unavoidable.

In the argument, it was insisted by the proctor for the respondents that the doctrine of the maritime law, which recognizes the rule of a division of the damages in a case of mutual fault, had not been authoritatively sanctioned by the courts of admiralty in this country. It is, however, well known that this principle has prevailed for many years in the courts of the Eastern districts of the United States. It has not, till recently, been distinctly affirmed by the Supreme Court of the United States. In the case of *The Schooner Catharine v. Dickinson et al.*, 17 Howard, 170, the

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court say: "Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance in navigation.

But, without taking more time in presenting my views of this case, I will state that on the grounds indicated, it seems to me, it is one of mixed or mutual fault, justifying an equal apportionment of the damages sustained between the two boats, and such is the decree in this case.

(DISTRICT COURT.)

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In a suit by the United States to recover a balance due on the books of the treasury department, the defendant can not give in evidence, as a set-off, a claim against the government, which has not previously been presented to, and disallowed by, the proper accounting officer, without proving that it was not before in his power to produce the voucher for such claim, and that he was prevented from exhibiting it, "by absence from the United States, or some unavoidable accident."

The rejection of an account or claim against the United States, by an accounting officer of the government, authorized by a special act of Congress to adjust the same on equitable principles, does not preclude the defendant, when sued, from setting up such rejected claim or account as a set-off.

There is no authority, either in the executive or judicial department of the government, to allow a claim against the United States, which is prohibited by law.

The legislation of Congress prohibits any extra compensation to an officer for services performed, properly pertaining by law to his office.

The defendant, as secretary of Minnesota Territory, having a fixed salary as such, was not entitled to claim, in addition thereto, the salary of governor, during the absence of that officer; as the act organizing the Territory made it the duty of the secretary, "in case of the death, removal, resignation, or necessary absence of the governor," to discharge the duties of that office, without any provision for an increase of compensation to the secretary.

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The proviso in the second section of the act of September 30, 1850, expressly prohibits the allowance of double salaries in all cases.

The act organizing the Territory of Minnesota, made the secretary the disbursing officer of the territorial government, and he can not claim a commission on such disbursements.

Where an officer, with a salary payable quarterly, is appointed for four years, "unless sooner removed by the President," and a removal is made during a current quarter, he is not entitled to his salary to the end of the quarter.

By the organic act of Minnesota Territory, the general government became pledged to defray "the expenses of the legislative assembly, the printing of the laws, and other incidental expenses;" and the defendant is entitled to a credit for services rendered, or expenditures made, within the fair scope and meaning of these terms, so far as they did not pertain to the office of secretary of the Territory; but the words "other incidental expenses" must be restricted to such expenses as were incidental to the legislative assembly and the printing of the laws.

The second section of the act of August 29, 1842, which applies to Territories, then or afterward to be organized, provides that no act of the legislature of a Territory shall be deemed of sufficient authority for a payment by the national treasury, and requires proper vouchers and proof of the same to be exhibited to the accounting officers of the proper department.

In a judicial case involving the accounts of a former secretary of a Territory, in which credits are claimed which have been rejected by the treasury department, the fact that such credits have not been embraced in the estimate required by the organic act of the Territory, to be previously made by the secretary of the treasury, does not preclude their allowance by a jury, if not objectionable on other grounds.

D. O. Morton, District Attorney, for the United States.

Corwin & Probasco, Judge Johnson, and Mr. Spooner,
for defendant.

CHARGE OF THE COURT:

This suit is brought on the official bond of the defendant, as late secretary of the Territory of Minnesota, dated March 31, 1849. A balance of \$4,078.41 is claimed as due to the United States; and treasury statements are in evi-

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dence, showing such balance against the defendant. The defendant exhibits claims against the government exceeding the amount of such balance, and insists on a judgment in his favor for the sum alleged to be due him.

The larger portions of the items of claims exhibited in the defendant's account have been passed upon and disallowed by the treasury department, under the provisions of a special act of Congress authorizing their adjustment on equitable principles. The defendant also claims an allowance of about one thousand dollars, embracing items of charge against the United States, which have not been presented for payment or allowance at the treasury department, and, consequently, have not been rejected by it. This latter class of vouchers was permitted to go in evidence to the jury, upon a suggestion that the defendant would be able to show reasons for their non-presentation which would render them admissible, and with the understanding that otherwise they were to be withdrawn from the consideration of the jury.

The fourth section of the act of Congress of March 3, 1797, 1 vol. L. U. S. 515, provides "that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination and by them disallowed, in whole or in part, unless it should be proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident." No proof has been exhibited by the defendant which brings the items referred to within either of the exceptions stated in the foregoing provision of the act of Congress, and they must, therefore, be entirely excluded from the consideration of the jury. The law is imperative on this subject,

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and vests no discretion in the court. There may be cases in which its operation may savor of harshness, or even of injustice, but there can be no doubt that such a provision is necessary to prevent the presentation of fraudulent or fictitious claims upon the government.

The other items of charge in the defendant's account having been presented to, and disallowed by, the proper accounting officer, under an act of Congress authorizing their settlement upon principles of equity, are properly in controversy in this suit. Such rejection of these items, by the treasury department, is not decisive of the rights of the claimant. The constitution of the United States vests all the judicial power of the government in the courts of the Union; and it is the unquestionable right of the citizen, in a suit brought by the United States for the recovery of a balance claimed, if his credits have been disallowed by the accounting officer, to present them for the decision of a court and jury.

There is an obvious necessity that the government should hold its subordinate agents to great strictness, and the most rigid accountability in all transactions involving official liability; and in discharging this duty, the highest executive officers must be guided by law, and are not at liberty to adopt their own views of right and justice as the basis of their action. Even in cases of reference to them by act of Congress, with a power to adjust and settle accounts on principles of equity, no authority is thereby implied to allow a claim against the government which is expressly, or by clear implication, prohibited by law. And the same principle of action applies to and must govern the court of the United States in adjudicating between the government and a citizen, as to matters of account. If the allowance of a claim is forbidden by law, a court and jury can not give it legal validity; but if not thus prohibited, and it is in its character just and equitable, though it may have been rejected by the proper officer, it may be allowed in a judicial

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tribunal, if properly authenticated by evidence. When the government comes before such a tribunal as a litigant party, its position is that of equality with the citizen; and it is entitled to no special immunities, unless expressly conferred by law. If it shall happen that even the application of these liberal principles, in such a controversy, shall fail to secure to the individual citizen the full measure of justice, his only remedy is an application to the legislative department of the government; the powers of which are ample to administer aright on the most comprehensive principles of equity, with no limitations except those imposed by the constitution.

The items of the account exhibited by the defendant, and on which the jury are to pass, are numerous, and include claims for various services and expenditures, as secretary of the Territory of Minnesota, embracing a period between March 31, 1849—the date of his appointment to office—and November 14, 1851, when he was superseded by the appointment of another person. I will not detain the jury by a special reference to all the credits claimed by the defendant in his account now exhibited, but having noticed a few of them, in respect to which the construction of the court has been called for, will state some general principles of law applicable to the whole account, which may afford a satisfactory guide to the jury, in their considerations as to its proper adjustment.

I may remark here, that it is insisted, by the counsel for the government, that all the items of charge in the defendant's account are liable to the objection, either that they involve claims for services rendered by him as secretary of the territory, legally pertaining to the office, and for which he is entitled to no compensation beyond the salary given him by law—or, if not included in this class, the services rendered and expenditures made were in virtue of laws or resolutions passed by the territorial legislature, for which there is no legal claim on the treasury of the United States.

It may now be regarded as a principle which admits of

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no question, that no officer of the United States, having a fixed salary, is entitled to any extra compensation for the performance of services or duties which pertain to his office by law. It is wholly unnecessary to refer to the legislation of Congress, or the decisions of the courts of the Union on this subject. The incumbent of an office is bound to perform all the duties belonging to it, without extra compensation. No man is under any necessity to accept an office, but having accepted it, the obligation rests upon him to discharge its duties for the remuneration which the law provides. He accepts it with a knowledge of the pay or salary attached to it, and, though its duties may be onerous, and the compensation inadequate, if he chooses to retain the office he must be content with what the law gives.

Some of the charges in the defendant's account are clearly within the objections just stated, and can not, therefore, be allowed by the jury. I will notice, very briefly, some of the principal items which, in the judgment of the court, must be rejected on this ground.

The charge of \$1,004 for salary as acting governor of the Territory during the absence of the governor, is clearly within the prohibition adverted to. There are two distinct periods of service charged by the defendant, for which he claims the salary of the governor, in addition to that of secretary of the Territory. The first is, from November 8, 1849, to February 12, 1850, amounting to \$645—the second, from April 10, 1851, to the 2d of June following, amounting to \$358.83. The charge for the latter period is within the operation of the proviso of the second section of the act of September 30, 1850, and its allowance is expressly forbidden by it. This proviso is in those words: "That hereafter the proper accounting officers of the treasury, or other pay officers of the United States, shall in no case allow any pay to one individual for the salaries of two different offices, on account of having performed the duties thereof, at the same time."

But, without reference to this act of Congress, the whole

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of this charge is liable to the objections, that the service was one which he was bound to perform as secretary of the Territory, and for which no extra compensation can be allowed. The third section of the act for the organization of Minnesota Territory authorizes and requires the secretary to discharge the duties of the executive, "in case of the death, removal, resignation, or necessary absence of the governor from the Territory." The defendant took the office of secretary knowing that, in any of the emergencies specified, the duties of the governor would devolve on him. And the law made no provision for any additional compensation in that event. In assuming the office of secretary of the Territory the defendant became bound to act as governor, if necessary under the law, as fully as he was obliged to discharge any other duty as secretary. It pertained to the office of secretary, though not strictly within the legitimate range of its duties. The salary certainly was less than the labor and responsibility required, but this is an evil which this court and jury can not remedy without usurping legislative power.

There is another item, \$557, charged in the defendant's account as a commission of one per cent. on funds disbursed by him as secretary. This is liable to the objection stated in the foregoing item. By the eleventh section of the organic act of the Territory, the secretary is expressly made the disbursing officer of the Territory, and is required to account to the secretary of the treasury of the United States for the manner in which the funds have been expended. This was, therefore, one of the duties required of him by law, as secretary, for which he is not entitled to any extra allowance.

I will here notice briefly another charge in the defendant's account that must be rejected. I refer to his claim for salary as secretary for the whole of the quarter ending December 31, 1851. It seems he entered on his duties as secretary in March, 1849, was removed by the President the latter part of October, 1851, but continued in the actual per-

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formance of his duties till the 14th of November in the last-named year. The defendant has been allowed his salary by the treasury department to the date of his removal, but it has been rejected for the balance of the quarter. No doubt can exist to his right to it to the 14th of November, when he was in fact superseded by his successor. It is insisted, however, that he is entitled to pay for the whole quarter. The argument is, that where an officer whose salary is payable quarterly is removed, by the act of the President, before the expiration of a current quarter, he is entitled to his pay to the end of it. This is believed to be in opposition to the uniform practice of the government in such cases. I do not propose to discuss the constitutional question of the power of the President to remove from office, at his own will, without presenting to the senate the grounds of the removal and obtaining its approval of the act. The defendant, conformably to the act organizing Minnesota Territory, was appointed to the office of secretary for four years, "unless sooner removed by the President of the United States." For many years past this has been the usual mode of commissioning executive and ministerial officers; and the power of removal, with or without cause, has been freely exercised by those who have held the presidential office for the last thirty years. True, there were those at an early period of our national government who contended that the spirit, if not the letter of the constitution, required the President to submit the causes of removal from office to the senate; and that, as it was only by and with the advice and consent of that body that an appointment could be made, the same formality was required in removing from office. Although there may be some, at this day, who maintain this view, the current of opinion seems to set strongly in the opposite direction. The practice of the government has been so long settled, and is so generally acquiesced in, that there is little probability of a change. And if conceded that the power of removal, without restriction or limitation, belongs to the President, the official duties

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of the incumbent, and with it, his right to salary or compensation cease when the successor assumes the office. The defendant's claim for salary, from the 14th of November to the 31st of December, will therefore be rejected by the jury.

Before passing to the consideration of the other part of the defendant's account, I will notice an item of \$116, charged as the expenses of a visit to Washington, to procure the funds appropriated by Congress for the support of the territorial government for the year 1850. From some cause, great delay had occurred in remitting the funds appropriated, to the seat of government of the territory. To hasten this remittance, the defendant made the journey to Washington. Its necessity is not very obvious, so far as there is any evidence on the subject. But if the jury believe the public interests of the territory required the journey, there is no reason why the defendant should not be reimbursed to the amount of his actual expenses.

It would detain the jury unreasonably, and, as I think, unnecessarily, to notice in detail the remaining items of charge in the defendant's account. In their retirement they will have the opportunity of giving to the account, and the vouchers which sustain it, a critical inspection. So far as any of these may be for services or duties performed, belonging to the office of the defendant, as secretary of the Territory, they will be disallowed, on the grounds already fully stated. There are others, however, which stand on another basis, and which present a different question for the consideration of the court and jury. Their allowance or disallowance will depend mainly upon the provisions of the act of Congress for the organization of the Territory of Minnesota. To such of them as bear upon the items in controversy, I will now briefly ask the attention of the jury.

This organic act was approved and took effect March 3, 1849. Section 4 vests the legislative power of the territory in the governor and a legislative assembly. Section 6 provides that the legislative power shall extend to all rightful

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subjects of legislation, consistent with the constitution of the United States, and the provisions of said act; and requires that all the acts of the governor and legislative council shall be submitted to the Congress of the United States; and if disapproved, shall be null and void. By section 12, the laws in force in the Territory of Wisconsin, at the date of her admission into the Union, are declared to be in force in Minnesota, so far as they were compatible with the act organizing the last named territory, subject to amendments and repeal by the legislature. By the same section, the laws of the United States were extended over, and declared to be in force in, Minnesota, so far as they were applicable. Among the provisions of section 11 is one declaring that there shall be an annual appropriation by Congress of one thousand dollars, to be expended by the governor to defray the contingent expenses of the territory; and also, annually, a sufficient sum "to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses." This appropriation is to be made upon the estimate of the secretary of the Treasury, and to be expended by the secretary of the Territory. Section 17 appropriates five thousand dollars for the purchase of a library for the benefit of the Territory.

These are all the provisions of the organic act which it is material to notice. The act, as is obvious, is based on the admitted doctrine that a territory is, in some sense, a ward of the general government, and that while in its state of pupilage, the primary and paramount power of legislation over it is vested in Congress. The act of Congress, however, granted to the people of Minnesota Territory the right to elect a local legislature, in which was vested the ordinary powers of legislation, subject to the restrictions and limitations specified. Among the powers thus conferred on the legislative body, was the power of taxation for legitimate territorial purposes. But the obligation was assumed by the general government to provide for the payment of the salaries and compensation of all the officers, whose appoint-

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ments were authorized by the act. It was also pledged to defray the contingent expenses of the territory, to an amount not exceeding one thousand dollars, and also "the expenses of the legislative assembly, the printing of the laws, and other incidental expenses."

One of the important questions presented in this case is, whether the charges contained in the defendant's account, which have not before been brought specially to the notice of the jury, and upon which the views of the court have been stated, are fairly within the scope and range of the words just quoted from the organic act. The jury will observe, from an inspection of the vouchers for that part of the account referred to, that they embrace charges for services rendered, and expenditures made, by the defendant alleged to be necessarily connected with, or incidental to, the administration of the territorial government. Without referring specifically to these items, I may remark here that so far as these claims are for services outside of the defendant's official duties as secretary, and may come within the designation of "expenses of the legislative assembly, the printing of the laws, or other incidental expenses," I see no objection to their allowance, if sustained by proof to the satisfaction of the jury. The act of Congress sanctions the payment of expenses, which may be classified under these heads, from the national treasury; and within the limitations already indicated, they would seem to be proper items of charge against the United States. But it is clear Congress did not intend to impose an obligation on the general government to meet every expenditure which might be authorized by the territorial legislature. That body was vested with a discretionary power of legislation, in regard to the local or internal interests of the territory; but any expenditure authorized for such purposes was to be paid out of the territorial treasury. And it is obvious, that an unlimited power in the legislature of a territory to authorize expenditures, which were to be paid by the general government, would lead to great abuses, and impose a grievous burden on the

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national treasury. There is not only no such power in the territorial government, but Congress has expressly provided, that in reference to the appropriation of money for expenditures in a territory, to be paid by the general government, the acts of a territorial legislature are not conclusive. By section 2 of the act of August 29, 1842, 5 L. U. S. 541, it is expressly required, as to all territories, then or afterward to be organized, that the accounts for such expenditures shall be settled and adjusted at the treasury department; and it is provided, "that no act, resolution, or order of the legislature of any territory, directing the expenditure of the sum, shall be deemed a sufficient authority for such disbursement, but sufficient vouchers and proof for the same shall be required by said accounting officers."

It shall be the duty of the jury, in reference to the class of charges now referred to, to determine from an examination of the vouchers, and other evidence adduced by the defendant, whether they are fairly comprehended under the heads of "expenses of the legislative assembly, the printing of the laws, and other incidental expenses." It is difficult, if not impossible, to define with certainty what may be rightfully included in these terms. I should not probably render the jury any essential aid, if I were to attempt to prescribe a rule for their action in this regard. I may remark, generally, that it is evidently within the spirit of the language used in the act of Congress, that the expenses incurred under any of the heads stated, should be necessary and proper, and the sums reasonable. This would necessarily lead to the rejection of any vouchers for expenditures for purposes not required in the proper discharge of the duties of the legislature of the territory, and not in promotion of the public interests. So, in relation to the printing of the laws passed by the legislature. The expenses incurred must have reference and be limited to the object stated. The words, "other incidental expenses," are of comprehensive import, and were, without doubt, adopted by Congress, to provide for

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any necessary expenses which could not be foreseen, and specifically pointed out. The fair construction of these words, in the connection in which they are used, would seem not to justify the conclusion that they were intended to include all expenditures which might be deemed incidental to the administration of the government of the territory. They must be limited in their import to the necessary incidental expenses of the legislative assembly and the printing of the laws. Within the limits thus indicated, if the evidence of the expenditures and services is satisfactory to the jury, and the charges are not within any of the prohibitions previously stated, they would seem to have the sanction of law, and may properly be allowed as credits to the defendant.

It is proper that I should here briefly notice an objection urged to the defendant's account, by the counsel of the United States, founded on the position that they have not been included in any estimate made by the secretary of the treasury, and can not, therefore, be viewed as legal set-offs to the claim presented by the government. It is true the act organizing the Territory of Minnesota requires the secretary of the treasury to make an estimate, in advance of the appropriation by Congress, of the expenses of the territorial government. Without discussing this subject, it may be sufficient to state that the duty enjoined on the secretary of the treasury is directory to, and obligatory on him. But if he omits to make an estimate, or if that estimate proves insufficient to meet the just expenditures contemplated by the act of Congress, it affords no reason why the claims of an individual, coming fairly within the scope and intention of the act, should not be allowed. The question now presented, arises in a judicial case, and the true inquiry is not whether there has been a previous estimate, embracing the charges claimed, but whether they are just, and not within any express prohibition of law.

I may also refer to the letters from the comptroller of the treasury, addressed to the defendant, while he held the

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office of secretary of the Territory, which are in evidence. These, it is insisted, authorize a part of the expenditures charged in the defendant's account. I shall not notice, in detail, the contents of these letters. It will be proper for the jury to refer to them, in their retirement, as a part of the evidence in this case. Whatever may be their purport, it can not be claimed for them, that they invalidate the positive provisions of law. So far, however, as they may be viewed as authorizing any of the charges or expenditures of the defendant, they may properly be considered by the jury; and as to items concerning which they might otherwise be in doubt, may exercise an influence in their decision.

With these views, the case is submitted to the jury. They will apply the law, as I have attempted to state it, to the evidence before them, and decide what portion of the credits claimed by the defendant shall be allowed, and what shall be rejected.

The jury returned a verdict for the United States for \$1,536.

(CIRCUIT COURT.)

JOHN W. ROBERTSON v. THE TOWN OF WELLSVILLE.

To constitute a valid dedication of property to public use, there must be not only an intention to dedicate, but an act manifesting such intention.

The law is liberal in its spirit and policy in regard to appropriations of property for a public use, and requires no particular formality to give them validity.

A dedication may be established by proof of verbal declarations, or by a written instrument, and, under some circumstances, it may be presumed from a long continued acquiescence of the owner in the use of the property by the public; but such presumption does not arise where such user is by the license of the owner, and not adverse to the title asserted by him.

There may be a good dedication of property to a public use, without a divestiture of the fee of the owner.

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Verbal declarations of the owner, that he had surrendered the control of the landing, or beach of the river, to the municipal authorities of a town, temporarily, and for a reason specified by him, do not import a legal dedication to the public.

Evidence of continued claim of title, and the exercise of acts of ownership over the property, by the person claiming title, may be conclusive to rebut a presumption of a dedication to the public.

The consent of the owner of land to the construction of a road upon it, for his own and the public use, does not make out a valid dedication.

Evidence of the execution and contents of a quitclaim deed, alleged to have been executed many years before the commencement of the suit, and which was never put on record, and never heard of or seen by those who might be supposed to be cognizant of it, at the time of its alleged execution, or those officially charged with its custody afterward, should be received with great caution.

H. Stanbery and G. M. Lee, for plaintiff.

H. H. Hunter and J. W. Andrews, for defendant.

CHARGE OF THE COURT:

This is an action of ejectment to try the title to a small strip of land lying in front of the town of Wellsville, in Columbiana county, extending north and south, or up and down the Ohio river, from the line of Lisbon street, in said town, to South street, and eastwardly from the east line of Front or Water street, a distance of about one hundred feet.

The proof of title by the plaintiff consists of a deed from William Wells and wife to Robertson and Rippert, dated May 1, 1847, and a deed from Rippert to the plaintiff, dated April 8, 1851. As both parties claim under Wells, there is no controversy as to his title.

The defendant claims the land in dispute, excepting the right of a ferry landing, sixty-six feet in width, at the termination of the road leading from Lisbon street to the river, which, it is admitted, belongs to the plaintiff. It is insisted by the defendant that the title to the land did not pass to Robertson and Rippert by the deed from Wells, for the reason that prior to the date of that deed, he had dedi-

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cated it to the public for a wharf or landing. And the question for the decision of the jury is, whether the evidence proves a valid dedication of the land for this public use. In the trial of this issue, it is the province of the court to define and declare what constitutes a legal and effective dedication of real estate to public use, and of the jury to determine from the evidence whether such dedication is proved.

The term dedication carries with it its true meaning, and is its own interpreter. To dedicate property to public use, is simply to appropriate, or set it apart to such use. There must be not only an intention to dedicate, but an act manifesting such intention. Hence, an expression of an intention, without some act to effectuate it, does not make a valid dedication. The law, however, as settled by a long course of judicial decisions, is liberal in its spirit and policy in regard to the appropriation of property to public uses. It requires no particular form or solemnity to constitute a valid dedication. In the ordinary transfer of real estate from one individual to another, the law wisely provides that it shall be evidenced by a writing signed by the grantor, and duly acknowledged before some public officer. But this is not necessary in a dedication, which may be by parol; nor is it necessary there should be any grantee named, or any consideration expressed. It may be established either by proof of the verbal declarations of the owner, or of a writing signed by him. And, under some circumstances, it may be presumed without proof of any act of dedication from the acquiescence of the owner in the use and occupation of property by the public. But, usually, such use and occupation must be adverse to the title of the owner to raise a presumption of dedication. Nor is it necessary to be a valid appropriation of property to the use of the public, that the owner should divest himself of the fee of the land. Hence, a grant of the use and occupancy of real estate for public use, without any restriction or limitation as to the duration of the right, is a good

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dedication, though the fee remains in the grantor. In such case, if the real estate, from any cause, ceases to be occupied for the purpose specified in the grant, it will revert to the owner or his heirs.

In this case, it is in evidence that William Wells was the proprietor of a considerable tract of land, bounded on the east by the Ohio river, which included the site of the present town of Wellsville. In the year 1823, he laid out the town, and made a plat, which was duly recorded. The strip of land in controversy was not included in the plat as a part of the town, and it is not claimed that the plat contains any evidence of an appropriation of the land for public purposes.

The defendant, as proof of title by dedication, relies, first, on evidence of the repeated verbal declarations of William Wells that he had granted the strip of land in dispute to the public for the purpose stated; and, second, on proof that he executed a written quitclaim or conveyance to the town of Wellsville, now lost, but the execution and contents of which, it is insisted, are proved by the testimony before the jury.

The witnesses proving the statements and declarations of Mr. Wells are numerous—twenty or upward—and it would be useless consumption of time to recite to the jury the testimony of each of these witnesses. I shall therefore merely give a brief summary of their statements. The first witness, called by the defendant, says that in 1823, 1824, and 1825, he was the assessor of property for taxation for the township in which the town of Wellsville is situate; and that in one of those years, when discharging his duties, Wells stated to the witness that he ought not to appraise the strip lying east of Water street, as it belonged to the town for a wharf or boat landing. Another witness testifies that in 1833, or '34, he purchased a lot of Wells, and after the purchase heard him say, he intended the owners of lots in the town to have the benefit of the beach of the river. All the other witnesses examined by the de-

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fendant, as to the declarations of Wells, state conversations had with him in the year 1838, and subsequently. One witness says that in that year he heard Wells say the wharf or landing belonged to the town, and the town ought to keep the road leading to it in repair. Another witness testifies that in 1838, or '39, Wells said in his presence, that the wharf or landing had been a trouble to him, and he had given it up to the town. Two witnesses, who were owners of wharf-boats, state that after 1838 Wells declined taking the pay for wharfage, and referred them to the mayor or town council. Several witnesses testify, in effect, that Wells declared in their presence that he had given the wharf or landing—or, as some say, the control of the wharf or landing—to the council, and did not wish to have any more trouble with it. One witness says the landing or beach from Lisbon street to South street had long been used by the public for the landing of boats, deposits of merchandise, etc., and that he had heard Wells say more than once, that the landing belonged to the public. Another witness swears, that he heard Wells say he did not intend the beach in front of the town to become private property, but intended it for public wharves. Another says, that in 1842, Wells stated he had given the landing to the council, and also testifies that the town had claimed all the ground from Lisbon to South street. A witness also says, Wells declared he had given it to the town, and that it might be worth something some day in helping to pay taxes, etc.

This brief statement of the substance of the evidence in relation to the declarations of Mr. Wells will suffice. It is insisted that they prove a dedication of the beach or landing to the use of the public. The jury will give this evidence such weight as they think it fairly entitled to, in view of all the circumstances of the case. And in weighing it, it will be proper to bear in mind that it relates to conversations which took place many years since, and concerning which, from the infirmity of human memory, there is a

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liability to mistake and error. If the jury believe that Wells, in his declarations on this subject, had reference merely to a grant to the authorities of the town of the right to control the beach for the purpose of regulating the landing of boats at the wharf, including a right to charge and collect wharfage for the use of the town, they do not prove a valid dedication of the property to the public use. The privilege granted, in that view, was only temporary, and was subject to revocation by Wells at his pleasure. It would seem that prior to 1838, Wells had exercised undisputed control over the beach or landing. In that year the town being desirous of improving the road leading from Lisbon street to the wharf, obtained his consent for that purpose, with the right, it would seem, to collect and receive wharfage. Many of the witnesses state, in connection with their testimony respecting the declarations of Wells, that he gave as a reason for vesting the town with the control of the beach or landing, that he had been greatly annoyed by the boatmen who had obtained privileges from him, and that to get rid of this he had transferred the management of it to the town. This would not seem to justify the conclusion that he had permanently dedicated the beach to the use of the public.

It is also insisted by the counsel for the defendant that the inference of a dedication is strengthened by the fact that in the act incorporating the town of Wellsville, passed in 1838, the strip of land in controversy is included in the limits of the town, as defined in that act, and that it confers on the town council the authority to construct wharves. This can not be held as affecting the title of Wells to the property in question, nor does it afford any just ground for the presumption that he had dedicated it to the public. It is also in evidence, that from the year 1833 the town council exercised jurisdiction over the beach or landing, and at different times enacted ordinances to prevent obstructions there, and to regulate the amount of license to be paid by wharf-boats, etc. This was a jurisdiction properly pertain-

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ing to the town authorities for police purposes, but its exercise could not deprive Wells of his right to this property. He could not be divested of this against his own consent, either by the legislature of the State or the town council.

I will now refer briefly to the evidence in connection with the quitclaim or conveyance, alleged to have been executed by Wells to the town of Wellsville, and which is relied on by the defendant to prove the dedication of the property in dispute. The evidence on this point is mainly that of the witness Jenkins. He states, in substance, that in September, 1838, he was a member of the town council, and that the construction of a new road from the end of Lisbon street to the river, including a wharf to facilitate the landing of boats, had been authorized, or was in contemplation. Doubts being intimated in the council as to its title to the road and its authority to make the improvement referred to, the witness says a committee was appointed to wait on Wells and ascertain the condition of the title, and that this committee reported an instrument of writing, signed by Wells, in the nature of a permission by him that the road might be made. This being unsatisfactory, the witness further states that it was proposed in the council that a quitclaim deed should be procured from Wells, and the witness was requested to write it. He wrote one, which he says was copied by another person and put into the hands of the committee. He also says that on the same day the committee presented the quitclaim deed to the council signed by Wells. The witness did not see the paper signed, but was well acquainted with the handwriting of Wells, and says the signature was genuine. The quitclaim was satisfactory to the council, and was ordered to be recorded. The witness states that he has not seen the paper since. He can not say whether any consideration was set forth in the quitclaim, nor does he remember whether it was acknowledged before any officer. He can not remember how the land was described in the deed, but supposes it included the strip east of Water street, from South street to Little Yellow creek

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on the north. He thinks there was a reservation of the ferry landing, but is not certain. It is insisted by defendant's counsel that the evidence of Jenkins, in relation to the quitclaim deed, is corroborated by the witness McLaughlin. This witness says that in September, 1847, then being mayor of Wellsville, the plaintiff, Robertson, remonstrated against grading the bank, on what he said was his property, and was included in his purchase from Wells. The witness says he replied to this that Wells had no right to sell it, as he had before given a quitclaim to the town, and that the plaintiff then said Wells had told him of the quitclaim, but that it was lost, and had never been recorded.

If the jury believe that a quitclaim was executed by Wells for the land in controversy, prior to the deed of Robertson and Rippert, it did not pass to them by that deed, and the plaintiff's claim of title in this suit necessarily fails. It will be the duty of the jury carefully to consider the evidence as to the execution of the quitclaim, and all the circumstances justifying the presumption that the witness, from failure of memory or other cause, is under a misapprehension as to the facts. The statements of witnesses relating to the execution and contents of the lost instrument, especially after the lapse of many years from the time of the transaction, should be received with great caution. It will also be proper for the jury to bear in mind that the witness Jenkins does not state that he was present at the execution of the quitclaim, but that he saw Wells' signature to it, which he believed to be genuine. It will also occur to the jury as a fact, to some extent irreconcilable with the statements of Jenkins, not only that the quitclaim was never put on record, but that it has never been seen by those who were then members of the council, or by any other persons since intrusted with the books and papers of the council, and that there is no entry or memorandum in the journals noting or referring to such an instrument.

Having thus summarily noticed the material facts in proof in support of the defendant's claim of a dedication of

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the property, I will briefly refer to the evidence for the plaintiff in rebuttal of this claim. This consists mainly of a series of acts, showing, as contended for by the counsel for the plaintiff, a continued claim to and exercise of ownership over the land in dispute by Wells up to the time of the sale to Robertson and Rippert, in 1847, wholly inconsistent with a previous dedication to the public. This evidence has been admitted by the court as competent, and it will be for the jury to determine what weight shall be given to it. As the witnesses to sustain this position are numerous, I will not detain the jury by reciting minutely the statements of each. It appears from the evidence of a number of these witnesses that in 1844 or 1845, owing to the vexatious annoyance to which he was subjected by the disputes and quarrels among the owners of wood-boats occupying the landing under a permission from Wells, and the difficulty of collecting the money they were to pay for their licenses for this purpose, he agreed that the council should take charge of them and receive the rents, and the places these boats were to occupy were fixed by an arrangement between Wells and the council. George Wells, the son of William Wells, states that prior to this arrangement his father had always collected and received the rents from these boats, and had claimed and exercised the exclusive control over them, and also the wharf, and that no one had questioned his right. All the witnesses on this subject speak of the right given to the council to control the boats as temporary, and not as implying a divestiture of the title of Wells. Several persons, who were members of the town council prior to 1845, say the town did not claim or exercise any control over any part of the landing till after the arrangement made in that year by which Wells transferred to the council the right to regulate and license boats, as before stated.

There are other facts in evidence, which it is insisted by the plaintiff's counsel, strongly negative the presumption of a dedication or grant of the landing for public use. In the first place, it appears that William Wells paid the taxes on

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the property in dispute till the year 1850. In 1826, he sold to his son, George Wells, a part of the land claimed by the town, lying above Lisbon street, on which he built a house, which remained there till 1849, when it was taken down by him. It is also in evidence that about the year 1826, George Wells, with the knowledge and consent of his father, at his own expense and for his own accommodation, made a road down the bank from the end of Lisbon street to the river, without any question as to his right to do so. It is also proved that when, in 1838, the council authorized a new road to the river, they applied to William Wells for his permission, which they obtained in writing. The evidence also shows that in 1836, William Wells entered into a written article for the sale of the entire tract of land owned by him, including the strip in dispute, to a company in New York, without reference to or reservation of any right in the public to it. This contract was not carried into effect, owing to the failure of the purchasers to comply with its terms; but it is insisted that the sale by Wells is an act in conflict with the presumption that he had previously dedicated the land to public use. It also appears that in the year 1849, subsequent to the sale to Robertson and Rippert, Wells, as their agent, notified the mayor of Wellsville to desist from grading the bank of the river on the land in controversy, claiming that it was private property, over which the town had no control. The jury will also bear in mind that the deposition of Wells, who is now deceased, taken and used in a case pending in a State court, in which the town of Wellsville was substantially one of the parties, and which involved the precise question arising in this case, has been admitted in evidence. In that deposition he denies having made any grant of the river beach east of Front street to the public use, either by any verbal declaration or by the execution of a written quitclaim or conveyance. He states that the only deed he ever made was that to Robertson and Rippert in 1847, and that the paper which he signed in 1838

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was a mere permission to the town council to improve the road from the termination of the street to the river bank.

This is a comprehensive statement of the material facts in evidence. If the jury are satisfied that William Wells, by his verbal declarations or by a quitclaim deed, dedicated the strip of land now claimed by the town of Wellsville to the use of the public, they will find for the defendant, with the exception of the sixty-six feet, extending from the end of Lisbon street, to which the pleadings admit the right of the plaintiff, as a ferry landing. On the other hand, if it shall be the conclusion of the jury that the evidence adduced by the plaintiff, does not prove such a dedication, their verdict will be in his favor.

It is, however, insisted by counsel that if the jury shall find against the town council, on the claim of a dedication of the whole strip with the exception of the ferry landing, their verdict must be against the plaintiff, as to the road leading from Lisbon street to the river. It is argued that the law applicable to the facts in evidence relating to this road, sustains the conclusion that it has been granted to the public as a highway, and that, although the fee remained in Wells, there is a right of user in the public that bars the plaintiff's recovery in this action.

The facts as to the construction of this road have been already referred to. There had been a road to the river, made by Wells in 1826. In 1838, from the growth of the town, and the increase of its river business, it became necessary, in the judgment of the council, that it should be improved. It was proposed to extend the road from Lisbon street, giving it a gradual inclination down the river, and to construct a stone wall on the lower side of the road, which could be used at some stages of water for the purposes of a wharf. Being in doubt as to the power of the council to make this improvement, without the authority of Wells, they applied to and obtained from him his written consent to it. The road was accordingly made and has been open to the public from that time.

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The writing executed by Wells, which is in evidence, expresses merely his consent that the council should make the proposed improvement, and contains no words indicating a purpose of dedicating the road exclusively to the use of the public. As the owner of the beach or landing, with the right, of course, of constructing a wharf for his private benefit, it was obviously the interest of Wells that the road should be made. But the facts do not imply a dedication of the road exclusively to the public use. On the contrary, the legal inference from the facts is, that there was a mere license by Wells to the public to use the road, in common with himself, subject, however, to his control as the owner of the soil. It is clear that, under these circumstances, the mere use of the road by the public, for any length of time, could not deprive the owner of the soil of his title or his right to its control as his private property. The use not being adverse to Wells, but by his permission, can not be construed as equivalent to a dedication.

The jury returned a general verdict for the plaintiff.

[NOTE.—The foregoing case was commenced prior to the division of the State in 1855 into two judicial districts, and transferred to the Southern District for trial.]

(DISTRICT COURT.)

JOHN THURSTON ET AL. v. STEAMBOAT MAGNOLIA.

A letter from a part owner of a steamboat requesting the person addressed to advertise the interest of the writer for sale, and in thus advertising to act as his agent, confers no authority to sell, and a sale under it is a nullity.

If such part owner, with a knowledge of the terms of the sale, and with due deliberation adopts and affirms it, it is obligatory on him to the extent of his interest, and he can not afterward disaffirm the ratification.

A power of attorney is not operative till received and accepted by the agent, and a power to sell for cash does not authorize a sale on credit.

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The pendency of a proceeding in replevin, in a State court, by which a party claiming to be a part owner of a steamboat has obtained the possession of the boat, does not affect the jurisdiction of a court of admiralty in a proceeding by libel, in which all the parties in interest are before it.

A plea of a prior suit pending is not sustainable, without the averment and proof that the cases are between the same parties and for the same cause of action.

The proceeds of the sale of a boat will be ordered to be brought into the registry of the court, to be apportioned among the parties according to their respective interests, as found and adjudged by the court.

Lincoln, Smith & Warnock, for libellants.

Ketchum & Headington, for respondents.

OPINION OF THE COURT:

The libellants aver that they are the owners of the steamboat *Magnolia*, in the proportions following: John Thurston has an interest of three-eighths; William B. Sutton, James Sutton, and Samuel L. Griffith, by the name of Sutton, Griffith & Co., have also an interest of three-eighths, and Levi Chapman and Edward C. Carter of one-eighth each. They allege that they are legally entitled to the possession of said boat, and that it is wrongfully withheld from them by one Donald Campbell, claiming the interests held by said Thurston, and said Sutton, Griffith & Co., through a sale made by Smith & Graham, of Cincinnati, as the agents of the last-named parties, to B. S. Scudder, and a sale and transfer by Scudder to said Campbell. It is further averred that Smith & Graham acted wholly without authority in the sale of the boat, and that the sale was therefore void, and that as to the interests of said Chapman and Carter, the said Campbell has no claim of title. A decree is asked for, adjudging the title to be in the libellants, according to the claim asserted by them, and for the delivery of the possession of the boat, and also for an account of the freight carried by the boat while in the possession of Campbell.

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Campbell has filed his answer, setting up a title to three-fourths of the boat, acquired through the sale by Smith and Graham to Scudder, as the agents of Thurston, and Sutton, Griffith & Co., and a sale and transfer by Scudder to him. And he avers, that having thus become the owner of said interest of three-fourths, and being entitled to the possession and control of the boat, he requested of said Chapman and Carter, then being in charge of said boat, at the wharf in Cincinnati, to deliver it to him; and upon their refusal to give him possession, he applied for and obtained a writ of replevin from the Superior Court of Cincinnati, in accordance with the statute of Ohio, by virtue of which the boat was delivered to him, and remained under his control until arrested by process in this case. The answer avers that the said sale was valid and legal, as being made by Smith & Graham, as the authorized agents of the parties before named; and, that if there was any defect in their authority to act as such agents, the sale has been since ratified and affirmed.

The first inquiry in the case is, whether Smith & Graham were the authorized agents of Thurston, and Sutton, Griffith & Co., and as such could make a valid sale of their interests. The facts in evidence, bearing upon the question of the authority of Smith & Graham, as agents, may be briefly stated as follows. The Magnolia being owned by the parties, and in the proportions stated in the libel, had been employed in the spring and early part of the summer of 1855, in the navigation of the Arkansas river, under the command of said Thurston as master. He had left the boat temporarily in charge of Chapman, who, as it seems from the evidence, without the knowledge of Thurston, brought it to Cincinnati. On July 12th, Thurston wrote to Smith & Graham, from Pine Bluffs, on the Arkansas river, complaining that Chapman had improperly withdrawn the boat from that trade, and notifying them that he, Thurston, was the master and had the control of an interest of three-fourths. He also informs Smith & Graham that he will be

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in Cincinnati in about a month from the date of the letter, and requests them, in the meantime, to give notice to the public, through one of the city papers, that Chapman had no authority to sell or otherwise dispose of the boat. In a postscript to the letter, he says, "please advertise three-fourths of the steamboat Magnolia for sale." And in a second postscript he adds, "in advertising the boat you will please be my agent. If any wish to purchase, let them inquire of you. The price for the three-fourths is \$8,000."

Under the authority, supposed to be contained in this letter, Smith & Graham, as the agents of Thurston and Sutton, Griffith & Co., advertised their interests for sale; and, on July 30, 1855, sold it to B. S. Scudder for eight thousand dollars. One-third of this sum was paid in hand, and the balance was divided into three equal payments, for which Scudder's notes, at three, six, and nine months, were given. Smith & Graham executed a bill of sale for the boat to Scudder, and on the day after the sale, by some arrangement between Scudder and the said Donald Campbell, Scudder sold and transferred his interest to Campbell. It would seem inferable, though the fact does not clearly appear from the testimony, that Campbell furnished the amount of the cash payment. It is admitted that Scudder was insolvent at the time, but Campbell procured indorsers on the notes for the deferred payments, which made them safe.

These are all the facts connected with the sale which it is now necessary to notice. And it seems to be a clear proposition, that the sale by Smith & Graham was altogether unauthorized, and is therefore void. As to the interest of three-eighths, owned by Sutton, Griffith & Co., it is clear, beyond all question, there was no authority to sell. They had not constituted Thurston as their agent; and, if they had so authorized him, he had no right to delegate that power to other persons. But there is no ground for the legal inference, in reference to Thurston's interest, that Smith & Graham were his agents for the purposes of a

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sale. In his letter he merely authorizes them to advertise the boat for sale, and give information as to the price asked for the interest of three-fourths. His statement that he expected to be at Cincinnati in one month, negatives the presumption of an intention to confer a power of sale, and warrants the inference of an intention to be personally present at and superintend the sale. And further, there is a strong reason for this conclusion in the fact that he gives no direction as to the terms of sale. It is not supposable that, in a transaction involving so large an amount, he would have intrusted Smith & Graham with authority to sell without some instructions as to the terms. It is evident, moreover, from the conduct both of the agents and the purchaser, that they did not regard the sale as a valid one. The instrument, purporting to be a bill of sale of the boat by Scudder to Campbell, shows, upon its face, that the parties supposed it doubtful whether the sale could be sustained.

But, it is insisted by the respondent, that if the sale was void, on the ground stated, it was subsequently ratified and affirmed by Thurston, and thus became valid. If this ground is sustainable, it can only apply to the interest of three-eighths owned by Thurston. As before remarked, there is no proof showing that Thurston was the agent of Sutton, Griffith & Co.; and it is clear that no ratification of the sale by him could affect their rights. The only question, therefore, is, whether there was such a ratification by Thurston as to render the sale of his interest obligatory on him.

Three witnesses state the facts which, it is insisted, show a ratification of the sale by Thurston. The witness Rhodes says that Thurston came to Cincinnati, some time after the sale, and was at the business place of Smith & Graham the next morning after his arrival, and that all the facts relating to the sale were fully and truly made known to him. He was then asked if he was satisfied with the sale, to which question he replied, "how could I be otherwise when I

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have got all I asked." The same witness states that, an hour or so after the conversation referred to, he heard Thurston inquire of Smith & Graham whether the notes taken for the deferred payments in the sale of the boat could be discounted. To which Graham replied that he could not say certainly, but he was satisfied the parties to the notes were good, and he thought they could be discounted. Thurston then remarked, that he "would be willing to stand a liberal shave to have the matter closed." The witnesses Yarrington and Scudder state, that at different times each heard Thurston express himself satisfied with the sale.

These facts show conclusively a ratification of the sale, which makes it binding on Thurston, in the absence of proof impeaching its validity. It is insisted, by the proctors for the libellants, that the acts of Thurston, in affirmance of the sale, were without due deliberation, and without a knowledge of the facts and the law necessary to a proper understanding of his rights. And they have proved that shortly after the ratification of the sale, Thurston applied to counsel for advice, who gave the opinion that Smith & Graham had no authority to sell, and that, consequently, the sale was a nullity. Thurston thereupon repudiated the sale, and the present libel was filed with a view to a legal adjudication of the rights of the parties.

There is nothing in the evidence proving that any undue means were used to induce Thurston to affirm the sale. All the facts were correctly stated to him. The interest of three-fourths in the boat, which he claimed to control, sold for the full amount stated in his letter to Smith & Graham as the price asked for it. It is also clearly proved that the indorsers of the notes for the deferred payments were responsible persons, and that there could be no doubt the notes would be paid at maturity. These facts were all stated to and known by Thurston; and there would seem to be no reason for the conclusion that he acted in ignorance, either of the facts or of his rights, or that he ratified the sale with undue haste. He could undoubtedly have in-

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sisted upon the invalidity of the sale, for the reasons that Smith & Graham were not empowered to sell; or if they had authority to sell, that they had exceeded their powers in selling on credit in part. But no such exceptions were taken, and he chose to assent to the sale; and having assented, he could not afterward revoke such assent. It is true it does not appear that the cash payment, or the notes taken, were tendered to him; but there is no proof showing a request by Thurston for the payment of the money, or the delivery of the notes to him. All the facts of the case warrant the conclusion that the proceeds of the sale would have been put into his hands, without objection, if he had not subsequently repudiated the ratification. And in the decree to be entered in this case, it will be the duty of the court to provide, that, to the extent of his interest as an owner of the boat, his right to the proceeds of sale shall be fully secured.

It results, from the views stated, that Thurston, by his assent to the sale, is divested of his interest of three-eighths in the boat, and that said interest is vested in Campbell. But, as before intimated, the right of Sutton, Griffith & Co. to three-eighths of the boat is not affected by the sale to Scudder, or the ratification by Thurston. Although it appears that Sutton, Griffith & Co. made out and forwarded by mail a written power to Thurston to sell their interest in the boat, it never came to his possession, and was not, therefore, an operative power. It is also in proof that the power of attorney intended for Thurston authorized a sale for cash. Thurston could neither sell, as the agent of Sutton, Griffith & Co., on credit, nor could he adopt or ratify a sale so made, which would be obligatory on them. Their interest in the boat still vests in them, and the court will so find in the decree to be entered.

There is another point requiring a brief notice. The respondent, in his answer, sets up, in the nature of a plea to the jurisdiction of this court, the pendency of the proceeding in replevin in the Superior Court of Cincinnati. I

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do not propose to examine or decide whether it is competent for a State court to supersede or defeat the admiralty jurisdiction of a court of the Union, in any case within the scope of its power. It is sufficient, for the point now presented, to remark, that if it is apparent, from the facts before the court, that Campbell had no title to the boat, or any interest in it, at the time he sued out the writ of replevin, the proceeding may be regarded as a nullity. The writ was sued out on the 5th of August, a few days after the sale by Smith & Graham to Scudder, on the *ex parte* affidavit of Campbell, that he was then the legal owner of an interest of three-fourths in the boat, and, as such owner, was entitled to its control and custody, which he alleged was wrongfully withheld from him by the persons in possession. Upon such oath the writ issues of course, and is the mere ministerial act of the clerk, without any judicial action in the case. Now, in point of fact, at the time the writ issued, Campbell had no claim to any interest in the boat, and could have no pretense of right to its possession. The sale on the 30th of July was clearly a nullity, and only became effective as to the three-eighths owned by Thurston, by his adoption and ratification of the act, which took place on the 7th of September. Till then, Campbell had no pretense of claim; and the obtainment of the writ of replevin, under such circumstances, was an abuse of the process of the State court. In addition to this, it may be remarked, that upon the supposition that he was a part owner of the boat, the current of authorities is strongly against his right to obtain possession by resorting to a writ of replevin.

But apart from the considerations stated, the objection to the jurisdiction of this court, on the ground of prior suit pending, must be overruled. Such a plea in no case is available, without the averment and proof that the prior suit is for the same cause of action, and between the same parties as that in which the plea is urged. There is no identity between the two cases on either ground. In the replevin suit, the sole object was the possession of the boat;

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whereas, in this, the rights and interests of all the parties are directly in issue; in the former, Campbell was the sole plaintiff, and Chapman and Carter the only defendants; in this, all the original owners of the boat are libellants, and Campbell the respondent.

A decree will be entered adjudging Sutton, Griffith & Co. to be the owners of three-eighths of the boat; Donald Campbell, three-eighths; Levi Chapman, one-eighth, and Edward C. Carter, one-eighth; and possession will be given accordingly. The cash payment for the boat, together with the notes given, will be brought into the registry, to be disposed of hereafter by the order of the court, in accordance with this opinion. As to the profits made by the boat while Campbell had possession, unless the parties agree as to the amount, a reference to a commissioner will be necessary.

(CIRCUIT COURT.)

FALLIS, BROWN AND COMPANY v. McARTHUR AND BERRY.

If, in a joint action against two defendants, both residents of another State, brought in an Ohio court, as to one of whom the process is served, and as to the other, returned *not found*, the party served removes the case to the Circuit Court of the United States, pursuant to section 12 of the judiciary act of 1789, the plaintiff is entitled to process from that court against the defendant, who was not made a party in the State court.

In such case, the plaintiff may proceed against the defendant, who has been served with process, as the Circuit Court has jurisdiction under section 1 of the act of February 28, 1839, and may hear and decide the case as against such defendant, without making the other defendant a party to the suit.

Collins & Herron, for plaintiffs.

OPINION OF THE COURT:

This suit was brought originally in the Superior Court of Cincinnati, and process issued jointly against both of the defendants, who, it appears, are citizens of the State of Kentucky. The writ was returned served, as to the defendant

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McArthur, and not served, as to the other defendant. McArthur entered an appearance in the Superior Court, and filed his petition for the removal of the case to this court, pursuant to the act of Congress. An order was made for the removal, and the papers have been duly filed, and the case docketed in this court.

An application is now made by the counsel for the plaintiff, in the nature of a motion for leave to issue a summons against the defendant Berry, to make him a party in this court. The question whether process can issue against him so that the case may proceed here, against both defendants, depends on the proper construction of section 12 of the judiciary act of 1789, 1 L. U. S. 79, which provides, in substance, that where a suit is brought in a State court against a citizen of another State, if the matter in dispute exceeds five hundred dollars, the defendant may, at the time of entering his appearance, file his petition for the removal of the case to the Circuit Court of the United States; and on giving satisfactory security that the case shall be entered in that court, and special bail given, if required, all further proceedings in the State court are suspended. And when so entered in the Circuit Court, it is declared it "shall then proceed in the same manner as if it had been brought there by original process."

This motion presents a new question of practice in this court, and no decisions in other Circuit Courts bearing upon it have been referred to. We think it clear, however, that under the provision of the statute just noticed, it is the undoubted right of one of two joint defendants, sued in a State court, to remove the case to this court; and where but one defendant has been served with process, the case may be removed upon his application. The act of Congress as to him would be wholly useless and nugatory in any other view. And having this right, it will follow necessarily that the plaintiff may prosecute the suit against both defendants here. Otherwise he would be

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wholly frustrated in seeking his remedy by a joint action against both ; and when brought into this court by the act of a defendant and against his own will, would be compelled either to discontinue the action or proceed against one of the defendants only. This would be giving to a defendant an unfair advantage not intended by the act of Congress, and not required by a just construction of its language. In providing that when removed to this court, the case shall proceed as if originally brought here, the implication is clear, that if necessary, process may issue to make the defendant who was not served in the State court a party. It is analogous to the case of process issuing against two defendants in a suit in this court, but one of whom is brought in by service. It is the uniform practice in such a case, and is a matter of course, to issue an alias writ to make the other defendant a party. So, under the statute, the proceedings in the State court are to be viewed as making one defendant a party ; and the case being thus in this court, it is the right of the plaintiff to have process against the other defendant.

There can be no question that under section 1 of the act of Congress of February 28, 1839, 5 L. U. S. 321, it is competent for the plaintiff to proceed in this court against the defendant McArthur alone. That section provides, that if several defendants are sued in a court of the United States, some of whom are not residents of, or can not be found within the district in which suit is brought, the court may take jurisdiction, and proceed to trial and judgment against those served with process. But the plaintiff in this case is not bound to proceed under this statute. If he prefers to bring in the other defendant by process from this court, his right to do so scarcely admits of a doubt.

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(CIRCUIT COURT.)

THE UNITED STATES v. JOHN J. DENNIS.

A recognizance is sufficiently certain if it sets out an act punishable by the statute without any of the particulars.

Where an action of debt was brought on a recognizance, the condition of which was, that the defendant should appear "to answer to the charge of stealing from the mail of the United States, contrary to the statute of the United States, in such case made and provided:" *Held*, that the felonious or criminal character of the act was charged with sufficient certainty.

The mail of the United States embraces everything which may by law be transported or conveyed by post.

John O'Neill, District Attorney, for United States.

Lee & Fisher, for defendant.

OPINION OF THE COURT:

This is an action of debt on the recognizance of the defendant as bail for the appearance of Henry Fulkerth, who has been charged, before a commissioner of this court, with a violation of the mail of the United States, the said Fulkerth being a postmaster. The commissioner required the accused to give bail, and, in default thereof, he was committed to jail. He subsequently appeared before the district judge, and, on his application, was admitted to bail and discharged from custody. The defendant entered into a recognizance for the appearance of the accused person at the October term of this court. It is averred in the declaration that he failed to appear, and that the defendant was called and duly defaulted. A general demurrer has been filed to the declaration, and the exception relied on is, that the recognizance does not define or state any crime made punishable by an act of Congress and of which this court has jurisdiction. The condition of the recognizance is, that the accused person shall appear at the then next term of the Circuit Court of the United States "to answer to the charge of stealing from the mail of the United States, contrary to the statute of the

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United States, in such case made and provided, and also such other charge or charges as may be exhibited against him." It is insisted that the allegations of "stealing from the mail of the United States, contrary to the statute," etc., are vague and indefinite, and do not import any specific crime for which the accused is to answer. The same certainty is not required in a recognizance that is required in an indictment; it is sufficient if it sets out an act punishable by the statute, without any of the particulars. It is very clear that a charge of stealing from the mail of the United States imports a crime without any statement of what was stolen. The mail of the United States embraces everything which may by law be transported or conveyed by post, and every unlawful taking from the mail of anything which constitutes a part of it is a crime. There is, therefore, no ground for a presumption that stealing anything, whether a mere letter or a letter containing money, or any paper or any other thing designated in the statute, can be an innocent act; it necessarily imports a crime. But when, as in this recognizance, it is added that such stealing was "contrary to the statute of the United States in such case made and provided," the felonious or criminal character of the act is charged with sufficient certainty. A case decided in Kentucky, reported in 3 J. J. Marshall, 641, has been cited by the defendant's counsel, where a recognizance for "gaming" was held bad by the court for uncertainty. That decision was right for the reason that *gaming*, as a general term, did not necessarily import a crime. It was only a crime when committed under the circumstances stated in the statute; under other circumstances it was perfectly innocent. It was necessary, therefore, to set out the game and the circumstances. If the charge had been "gaming contrary to the statutes of the State of Kentucky," it would have been good. But as before stated, no state of facts can be conceived of, in which stealing from the mail of the United States can be an innocent act—it implies a crime.

The demurrer will therefore be overruled.

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(DISTRICT COURT.)

SEAMAN AND GILLESPIE v. STEAMBOAT CRESCENT CITY.

In a case charging a collision by a steamboat on a flat-boat heavily laden, if there is doubt on the question of fault, by reason of a conflict in the evidence, the presumption of wrong will be against the steamboat.

After a cargo is shipped, the shippers can not demand it short of the port of destination without payment of full freight for the voyage.

In this case, the flat-boat was laden with flour in barrels, destined for New Orleans; as the result of the collision, the flour was submerged in water for several hours, and injured thereby; the master of the flat-boat, having repaired his boat, reshipped the flour on the same boat for New Orleans, where it arrived after a passage of three weeks, and was there sold at a great loss from its damaged condition; and as the collision occurred only sixty miles below Cincinnati, to which place the flour could readily have been shipped, and where it would have sold with little loss: *Held*, that the master of the flat-boat should have sent the flour to Cincinnati for sale, that being the nearest and best market; and that the owners of the steamboat, adjudged guilty of fault in the collision, are liable only for the actual loss that would have occurred, if the flour had been shipped to and sold at that place, and not for the loss sustained by the sale at New Orleans.

Lincoln, Smith & Warnock, for libellants.

Charles Fox, for respondent.

OPINION OF THE COURT:

The facts averred in the libel in this case may be summarily stated as follows: That on January 18, 1854, at Malta, on the Muskingum river, the libellants shipped on a barge or flat called the Falls City No. 5, of which J. R. Bell was master and pilot, twelve hundred and ten barrels of flour, to be conveyed to New Orleans; that on the 20th of February, about two o'clock P. M., at a place on the Ohio river, about two miles below Sugar creek, and about sixty miles below Cincinnati, and at the distance of about two hundred and fifty yards from the Kentucky shore, the river being broad, and without any obstruction to navigation, the steamboat Crescent City came up the river and made a landing on that shore, and took a wood-flat on its larboard

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side, and thence came quartering out from shore, across the stern of the Falls City, and caused the flat in tow of said steamboat to strike the flour-barge on its larboard side, about twelve feet from the stern, tearing out the side from that point to the center of its stern, and causing it to sink so far that the cargo floated out into the river, and the flour was thereby greatly damaged by water; that most of the floating flour was caught and taken to New Orleans, and sold for the benefit of whom it might concern.

The libellants allege that the loss on the sale of the damaged flour at New Orleans was \$3,384.70, for which, with expenses amounting to \$43.50, and interest from March 20, 1854, they claim a decree.

The Crescent City having been attached at the port of Cincinnati, under process issued from this court, George Leslie intervened as the owner of the boat, and filed his answer, averring in substance that said boat, in coming up the Ohio river, crossed from the Indiana side to Powell's wood-yard, two miles below Sugar creek, on the Kentucky side, and there caused a wood-boat to be attached on either side of the steamboat, intending to take them in tow; and that while lying close to the shore, the stern aground, or nearly so, and the gunnel of the starboard wood-boat held fast by a tree, the steamboat being kept in that position by going forward with the larboard engine, and backing with the starboard engine, two flour-barges, lashed together, floated down within from one hundred to one hundred and fifty feet of the Kentucky shore; and by reason of the failure of the crew to lay the barges out into the river, the larboard side of the inner barge struck the wood-boat attached to the larboard side of the steamboat, thereby knocking a hole in its side, and causing the injury complained of by the libellants. The answer avers that the collision was not occasioned by any fault in the management of the steamboat, but wholly through the negligence and misconduct of the crews of the flat-boats.

These are the allegations of the parties presenting the

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points involved in this controversy. The case made by each is in direct conflict with that made by the other, and each, it is insisted, is sustained by the evidence. The duty, never pleasant, and not wholly free from difficulty, when the proofs are so seemingly contradictory and discrepant, is thrown upon the court of fixing on some satisfactory basis for a decree.

There are fortunately some facts which are not controverted in the case. The collision happened between one and two o'clock in the afternoon of the 20th of February, 1854, in what is known as Sugar Creek bend, on the Kentucky side of the Ohio river, some two miles below the mouth of Sugar creek, and about sixty miles below Cincinnati. The river at the time was high, being, in the boatman's parlance, at an eighteen or twenty foot stage. The river is wide there, and the water, even close in to the Kentucky shore, of sufficient depth to float a steamboat of large size. Although there is a considerable bend in the river on that side, there is nothing to obstruct the view up and down for a distance of several miles. The weather, on the day named, was clear and calm. The current, at the place of collision, at the stage of water before stated, is about four miles and a half to the hour, setting in toward the Kentucky shore, and being strongest from two hundred to two hundred and fifty yards from that shore.

These facts warrant the inference that the collision in question could not have occurred without culpable negligence or want of skill in the management, either of the steamboat or the flour boat; and that one or both must be held responsible for the injury which resulted from it.

Before stating the views entertained by the court, upon the evidence adduced, it may be proper to remark, that in a controversy involving a collision between a steamboat and a flat-boat, so far as presumptions are allowable, they must be strongly against the former. A steamboat, especially one having side-wheels and powerful engines, as is the fact in relation to the Crescent City, has entire control of its move-

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ments, and, by the aid of its machinery, can change its direction or position with rapidity and ease, under ordinary circumstances. On the other hand, a flat-boat, heavily laden, being wholly dependent on the use of human strength and effort to effect a change in its direction or position, is moved slowly and with difficulty. The object of those having such a craft in charge, is to keep it in the strongest water, where its descent will be most rapid. It is obvious that a flat-boat can do little in avoidance of a collision; and that in competition with a steamboat, the latter will be held to stringent rules, in case of injury to the former. This, however, does not admit the conclusion that there may not be such negligence and want of skill in the navigation of a flat-boat, as to create a liability for an injury resulting from a collision.

In stating the conclusions of the court, I do not regard it as necessary to present a critical analysis of the evidence offered by the parties. The right of the libellants to a decree in their favor depends wholly on the credit due to their witnesses. If the facts proved by them are credible, it is clear that no culpability attaches to the management of their flat-boat, and that the fault rests wholly on the steamboat. And the main fact in question relates to the position of the two boats, at the time of the collision. If, as the libellants allege, their boat was descending in the channel, at a proper distance from the shore, and the steamer, going forward, struck the flat, and thus caused the injury to the cargo, there can be no doubt as to which boat was in fault.

The libellants have proved, by some seventeen or eighteen witnesses, the circumstances under which the collision happened. A number of these witnesses, including the master of the flat-boat which was injured, were employed on that boat at the time, and, as they state, saw the collision. Others were employed on the boat which was lashed to the injured flat, and had equally favorable opportunities of noticing the position and movements, both

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of the flat and the steamer. Several others were on another pair of flat-boats, some four or five hundred yards in advance of the one which was struck, but in clear view of the transaction. One witness was in a skiff, just above, but near the boats when they came together. Two witnesses were on a store-boat, between seven and eight hundred yards above the wood-yard at which the Crescent City took the wood-flats in tow, prior to the collision, who swear they saw the boats, and state distinctly their position and movements.

Without stating minutely the facts sworn to by each of these witnesses, it is sufficient to remark that there is a substantial agreement in their testimony as to the important facts relating to the collision. These facts may be comprehensively stated as follows: That the Crescent City, in its progress up the river, crossed over from the Indiana side and made a landing at a wood-yard on the opposite side. The steamer, having taken a wood-flat in tow on either side, after a detention of a few minutes, left the landing, and had proceeded upward some two or three hundred yards, the bow then quartering up stream, and at a distance of not less than two hundred yards from the shore, when the corner of the wood-flat on the larboard side of the steamboat struck the larboard side of the flour boat, which was next to the Kentucky shore, about twelve feet from its stern, carrying away the side of the flour boat from that point, including the stanchions, to the middle of the stern. As the result, the boat began immediately to sink, and a part of the flour, constituting its cargo, floated in the river. The crew of the flour boat succeeded in landing it a considerable distance below the place where the collision occurred.

In relation to the distance from the Kentucky shore to the place of collision, the witnesses referred to vary somewhat in their testimony. None estimate it at less than one hundred yards, and much the larger number at from two hundred to two hundred and fifty yards. The mesne of

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their estimates is about two hundred yards. In corroboration of their testimony as to this distance, several of the witnesses who were employed on the flour boats, and who assisted in landing the injured boat, swear that immediately after the collision they attempted to carry out a line, which, it is in proof, was about two hundred yards in length, and which would not reach the shore.

The remark is proper here that the witnesses for the libellants are in no case otherwise impeached than as they are contradicted by those of the respondents. No direct evidence is offered impugning their credit as persons deficient in character for truthfulness. They are before the court, therefore, with a just claim to credibility, unless the facts stated by them are contradicted by the testimony of more reliable witnesses. And, if credible, they clearly establish the position, that no fault is imputable to those in charge of the flour boat, and that the steamboat must be held responsible for the injury sustained by the collision.

It is insisted, however, on the part of the respondent, that the evidence adduced by him relieves the steamboat from the charge of negligence or misconduct, and that the fault is wholly on the other side. A number of witnesses have been examined by the respondent to sustain this view. They consist of the master of the steamer, one of the mates, an engineer and his assistant, together with some of the deck-hands, and several persons who were at the wood-yard when the steamboat landed and at the time of the collision. I shall not attempt critically to examine the statements of these witnesses. They coincide in saying that after the steamboat took the wood-flats in tow, and up to the time of the collision, there had been no forward motion of the boat; and that at that time the boat was lying with its stern near, or on the shore, and the bow quartering up stream, and not more than thirty yards from shore; and, that while in this position and kept there by the reversed action of the starboard and the forward

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action of the larboard engines, the flour boat being out of its place, and much too near the Kentucky shore, came against the steamer and thus sustained injury. It is further insisted, and there is the evidence of several of the respondent's witnesses to establish the fact, that the gunnel of the inner wood-boat attached to the steamer was entangled with a tree standing in the river near the shore in such a way as to prevent it from being moved upward, and that being aground at the stern, or very near the shore, there was no possibility of backing so as to avoid the descending flour boat.

If this view is to be sustained, it follows that the flour boat was within thirty yards of the Kentucky shore, and also that the steamer was in a position rendering it impossible to get out of the way of the flour boat, and can not, therefore, be held responsible for the injury which resulted.

The sanction of the view thus urged by the respondent necessarily involves the repudiation of the testimony of nearly all the witnesses for the libellants. Considering the number of these witnesses, their opportunities of seeing the transactions of which they testify, and the clear and explicit statements they make, in relation to the main facts of the case, in the absence of any extrinsic evidence impairing their claim to credit, I do not see on what ground I can arbitrarily set them aside as unworthy of belief. To suppose that such a number of persons, without any apparent motive, could willfully have falsified the truth, is a conclusion which I should most reluctantly adopt. Nor do I think, that in crediting their statements, it follows, necessarily, that the witnesses for the respondents have testified corruptly. It seems to me that the apparent discrepancy between the witnesses for these parties, may, to a great extent, be explained and reconciled by the very reasonable assumption that the witnesses for the respondent, in their statements as to the movements of the steamer, its position and distance from the shore at the time the

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collision is supposed to have occurred, had reference to a state of things existing but a few minutes prior to that occurrence. It is doubtless true that the steamer, when the wood-boats were first taken in tow, was very nearly in the situation the witnesses describe. Its stern was probably on or very near the shore, and its bow thirty or forty yards, or less, out from the shore, and there was a forward and a backward action of the engines to enable it to maintain that position. But is it not reasonable to suppose these witnesses are under a mistake in saying—as some of them do—that there was not afterward a forward motion by both engines, which carried the boat outward into the stream, till it was two hundred yards from the shore, and had attained the position and place described by the libellants' witnesses, at the time the collision took place? It would require but two or three minutes to produce this state of things; and it might readily happen that the witnesses, not considering what change of position might take place in so brief a space, have stated the impressions made on their minds from facts observed at a prior time. I adopt this conclusion as reasonable, and as tending to harmonize the evidence and avoid the otherwise inevitable conclusion that some of the witnesses have corruptly stated that which is untrue.

There is one fact, which, in my judgment, greatly strengthens the inference that the witnesses for the libellant are correct in saying the steamer was under headway, when the collision happened, and that those for the respondent, who testify that it had no forward motion then, are mistaken. I refer to the great force with which the flour boat was stricken. The result of the collision on the flat-boat has been stated. It seems improbable that such an injury could have been inflicted, upon any other supposition than that the steamboat had a forward motion at the time. The mere force of the current, carrying the flour boat against the corner of the wood-boat, while at rest, is

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not sufficient to account for the injury sustained by the former.

But, without pursuing this investigation further, I have but little hesitancy in reaching a conclusion, from a careful consideration of the whole case, that the responsibility for the injury resulting from this collision must rest on the Crescent City.

I will now state briefly the principles on which the damages are to be estimated.

It appears that after a detention of four days at Sugar Creek bend, the injured boat was repaired, and the flour, with the exception of five barrels which were lost, was reshipped on the same boat and reached New Orleans about March 18, 1854. It was consigned for sale to the firm of Graham & Buckingham, commission merchants of that city; one of the members of which house testifies that the flour was badly damaged by water. Its value at New Orleans, if in good condition, at that time, would have been \$6.75 per barrel. It was sold at public auction on the 22d of March, after due notice given, at an average of about four dollars the barrel. It is claimed by the libellants, that the difference between the price for which the flour sold and the market value of the article, if not damaged, adding thereto the charges and expenses at New Orleans, furnish the rule for the assessment of the damages in this action. Adopting this rule as the basis of a decree, the damages amount to \$8,281.50, for which, with interest from March 22, 1854, a decree is asked.

On the subject of damages, in cases of collision, the Supreme Court, in the case of *Smith et al. v. Condry*, 1 Howard, 28, say: "It has been repeatedly decided in cases of insurance that the insured can not recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and

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place of the injury that is the measure of damages. In the case before the court, this rule can not apply, for the reason that there was no market for flour at Sugar creek, where this collision occurred. And it is obviously proper, therefore, to estimate the damages according to the peculiar circumstances of the case, having due regard to the spirit of the rule sanctioned by the Supreme Court. It is conceded, and such is the proof, that there is no market for flour below the place where the injury occurred short of New Orleans; and that Cincinnati, sixty miles above the place of collision, is one of the best markets in the West for flour generally, and especially for flour damaged by water, where it is always in demand and meets with ready sale, at a good price, for making starch and for other purposes. It is also in evidence that, at the time of this occurrence, there was but a slight difference in the market rates of flour at New Orleans and Cincinnati.

The inquiry arises, was it proper for the owners or supercargo of the flour which was injured by water, to reship it for New Orleans, the place of its original destination, to be conveyed there at the slow rate at which a flat-boat must necessarily descend the river? On this subject, the obvious rule of justice is, that the owner or supercargo should act in good faith, and with the prudence and discretion which would be expected of men in their ordinary transactions. Now, it would seem from the evidence, that while parts of this flour were in the water but a few hours, other parts of it were submerged some portion of three days. It could not be otherwise than that the injury to the flour was considerable. Some unsuccessful efforts were made to procure the transportation of the flour to New Orleans by steamboat. This mode of conveyance would have insured its conveyance to that city, in a few days from the occurrence of the accident; and such a shipment of it would, doubtless, have been proper, under the circumstances. But failing in this, the course dictated by prudence was its conveyance to Cincinnati, which would have insured its being in

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market within a short period of time. This was entirely practicable; for the evidence is, that boats were running daily between Louisville and Cincinnati. It appears, however, that no attempt was made, looking to this disposition of the flour.

It is the testimony of witnesses, of great experience in the flour trade, that the injury to flour which has been wet is increased in proportion to the length of time it remains in that condition. In warm weather it soon becomes sour; in cold weather, this effect is not produced. It could not be otherwise than that the damage to this flour would be materially enhanced by the time occupied in getting it to New Orleans in a flat-boat. It was between three and four weeks in reaching that place, during the latter part at least of that time, embracing a part of the month of March, the weather was probably warm, and the liability to injury therefore greater.

In view of all the facts of this case, I have not been able to perceive that any principle of justice requires that the respondent should be accountable for the increased loss on the cargo, resulting from the obvious error committed in shipping the flour to New Orleans instead of Cincinnati.

It is in evidence by experts on this subject, that the damage to flour which has been wet ranges from fifty cents a barrel to one-half the market value of the article, if uninjured. The extent of the damage depends something on the length of time it is exposed to the water, and the length of time it remains wet, before being used. The injury is greater or less, also, according to the construction and quality of the barrels. One witness states, that where flour has been under water but an hour, or something more, it will sell at a loss not exceeding one dollar on the barrel—and another witness states that the loss would not exceed fifty cents the barrel. These witnesses have reference to the Cincinnati market.

As to this cargo, if the price for which the flour was sold at New Orleans is adopted as fixing the ratio of injury, it

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would be nearly two dollars and seventy-five cents the barrel. This is obviously greatly beyond the loss which would have accrued if it had been brought to Cincinnati and sold there. And the fact first stated clearly shows the impropriety of its shipment to New Orleans.

The evidence affords no precise data, by which to estimate the loss that would have accrued, if the flour had been sent to Cincinnati for sale. It may be fairly assumed from the evidence, that it would not have been less than one dollar and fifty cents on the barrel. This estimate has not the certainty that is desirable, but it doubtless approximates the real loss that the libellants would have sustained, if the course indicated as proper had been followed in the disposal of the injured flour. If it were possible to attain greater certainty in this respect, by a reference to a commissioner, I would willingly make an order to that effect. But I do not see that this object can be effected by such a course.

In addition to the direct loss from the injury to the flour, the libellants claim, as a part of the loss resulting from the collision, the freight agreed to be paid, and which it appears was paid, to the owner and master of the barge, for its conveyance to New Orleans. The price agreed on by the parties, and stated in the bill of lading, was sixty-two and a half cents the barrel. If the court is right in its conclusion, that the rule of damages in the case is the market value of the damaged flour at Cincinnati, it is clear the libellants are entitled to recover the freight paid to the place of destination. The evidence proves that after the collision the master of the barge repaired his craft, and after a detention of between three and four days, proceeded forward with the cargo on board. This he had an unquestionable right to do, under the circumstances of the case, and was, of course, entitled to full freight. If the owner had appeared at the place of the accident, and had demanded the possession of the cargo, there would have been no obligation on the freighter to have delivered it to him, without payment of full freight. The law on this point is stated to be: "After

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the shipment of the cargo on the voyage, the shippers have no right to demand it at any intermediate port, short of the port of destination, without payment of full freight for the voyage, whether the cargo arrive in a damaged or undamaged state." Flanders on Shipping, 250. The reason of this is stated by the same writer to be, that unless the ship is so wholly disabled as to be incapable of carrying the cargo to the place of its destination, the master has a right to insist upon the contract, and to a full opportunity of earning the freight agreed to be paid.

In this view, the libellants derived no benefit from the delivery of the damaged flour at New Orleans, and are the actual losers of the amount of freight paid to that place. This loss is, therefore, to be regarded as resulting from the collision, and constitutes a proper item in estimating the damages for which the owners of the steamboat are responsible.

A decree will, therefore, be entered for the libellants, on the basis of a loss of one dollar and fifty cents on the 1,205 barrels of damaged flour, delivered at New Orleans, to which will be added the value of five barrels which were lost at the time of the accident, to be estimated at six dollars and seventy-five cents the barrel; and also the freight paid by the libellants, being sixty-two and a half cents the barrel, on the entire cargo.

(DISTRICT COURT.)

ELISHA T. SPENCER v. STEAMBOAT CHARLES AVERY AND CARGO, ETC.

Where a steamboat, on the Ohio river, laden with flour, was sunk by floating ice within a few feet of the shore, and her cargo was saved, at the request of the master of the boat, by fifty or sixty persons on the bank of the river, such service entitles the parties to a decree for salvage.

It is a well-settled principle of the maritime law, that risk or danger of life is not a necessary element of a salvage service. Where such risk or

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danger is incurred in saving property from destruction, it will place the salvors in a high position of merit, and entitle them to a more liberal compensation for the service than would otherwise be accorded to them.

The controlling inquiry in salvage cases is, was the property in peril of being lost, and was it saved by the efforts of those claiming to be salvors.

The measure of compensation, in salvage cases, depends wholly on the circumstances attending the service. Where there has been great personal exposure and risk, and property has been rescued from inevitable destruction by the intrepidity of the salvors, a liberal allowance will be made. One-half the value of the property saved has been allowed in such cases. There may be cases where the service is attended with so little difficulty and peril that it would entitle the parties to little more than a *quantum meruit* for work and labor.

It is not material whether the salvage service was rendered spontaneously or by request, or whether with or without a previous contract between the owner or his agent and the salvors.

Persons who aid in a salvage service, and receive pay therefor from the owners of the property saved, abandon their right as salvors.

Chapline & Caldwell, for libellants.

King & Anderson, for respondents.

OPINION OF THE COURT:

This action was brought to recover compensation for an alleged salvage service rendered by the libellant and others in the rescue of the cargo of the steamboat Charles Avery. The material facts are, that for several weeks prior to the 6th of February last, the said steamboat, laden principally with flour in barrels and wheat in sacks, had been ice-bound at Hockingport, a short distance above the mouth of Hocking river, within a few feet of the shore of the Ohio river. About nine o'clock in the morning of the 6th of February, the ice in the river began to move, and, in its descent, struck the starboard side of the steamboat with such force as to make an opening some forty feet in length, and two feet in width, through which the water entered rapidly and caused the boat almost instantly to sink and settle on the bottom of the river. There was at that place about two and a half feet of water, and the river was rapidly

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rising. A part of the flour was stowed in the hold of the boat, a part on the lower deck, aft the boilers, and some three hundred and fifty barrels on the guards. The wheat, with the other portion of the cargo, consisting of twenty-one barrels of dried ginseng, and a quantity of rags and feathers, was also on the lower deck. At the time of the disaster, the master of the boat and three of the crew were present; and a Mr. Williams, acting apparently by the authority of the master, proposed to the persons then on the bank of the river, to assist in taking out and saving the cargo. These persons, numbering between fifty and sixty, of whom Spencer, the libellant, was one, immediately engaged in the work, and were assiduously and laboriously engaged from about half after nine o'clock in the morning till between four and five o'clock in the afternoon, when they ceased working, having taken out and placed on the shore eight hundred and ninety barrels of the flour, four hundred and seventy-seven bushels of wheat, and the ginseng, rags, feathers, etc., which made up the residue of the cargo. Eighty-six barrels of the flour were left in the hold of the boat, and were removed by other parties, some days after the sinking of the boat.

It appears from the evidence that in the evening after the property had been rescued from the boat, Mr. Williams gave notice to those who had aided in the work, that he would pay them for their services; and thirty-three of the number applied for and received payment at a rate varying from \$1.25 to \$2 each. The other part of the company declined to receive pay, and they are, as the court is informed, claimants for salvage, although no one but the libellant, Spencer, has commenced any proceeding to enforce this claim.

The cargo was owned by several different persons, whose names are set out in the answer. They insist, by their counsel, that the service rendered by the libellant, and those acting with him, was not a salvage service for which they are entitled to compensation upon any principle of the

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maritime law. And this is the principal inquiry presented for the determination of the court.

It is very clear there was no apparent danger of the loss of life in the removal of the cargo. There was, indeed, a possibility that while the persons at work were engaged in removing the flour from the hold of the boat, it might have been torn to pieces by the pressure of the ice upon it; in which case they would have been in great danger. But as this result did not take place, there is no ground for assuming that there was any personal danger to the parties beyond the injury to health, which might result to those who worked in the water in the removal of the flour from the hold of the boat. It is, however, clear beyond all question, that a part, at least, of the cargo was in immediate and imminent danger of being irrecoverably lost. There is very little doubt, that if not removed, the flour upon the guards, and most probably all that was deposited on the deck, would have been carried away by the water. The river was rapidly rising when the boat sunk, and when labor was suspended in the evening, there was nearly four feet of water on the deck. It is equally certain that the injury to the cargo, from the action of the water, would have been somewhat in proportion to the length of time it was submerged. It would result that the damage was materially lessened by the promptness with which the property was removed from the boat.

Do these facts present a case which entitles the parties to a decree for salvage? It is a well-settled principle of the maritime law, that risk or danger of life is not a necessary element of a salvage service. It is true that where such risk or danger is incurred in saving property from destruction, it will place the salvors in a higher position of merit, and entitle them to a more liberal compensation for the service than would otherwise be accorded to them. But the controlling inquiry is, in salvage cases, was the property in peril of being lost, and was it saved by the efforts of those claiming to be salvors? Salvage is defined

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to be, "the compensation allowed to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss." Abbott on Ship. ed. of 1846, 659. In the case of *Talbot v. Seaman*, 1 Cond. R. 229, the Supreme Court of the United States distinctly recognize this principle. The danger to the property must be real and imminent, and not merely speculative. In 1 Conk. Ad. 279, the doctrine is stated thus: "If the case be one demanding assistance, and it is effectually rendered in saving the vessel or cargo, or any part of either, from impending destruction or loss, a claim for salvage will be maintained." This doctrine was recognized by this court in the case of *McGinnis v. Steamboat Pontiac*, 5 McLean, 359. And it is also settled, that it is not material whether the salvage service was rendered spontaneously or by request, or whether with or without a previous contract between the owner or his agent and the salvors.

These principles, applied to the facts proved in this case, leave no reason for a doubt that the service rendered was a salvage service, for which compensation may be awarded by a court of admiralty. It is true the service rendered does not import the highest grade of merit. It lacks some of the elements necessary to give it this character. As before remarked, there was no apparent peril of life in the service; but it was promptly rendered, and laborious and exhausting while it continued, and effective in its results.

The measure of compensation in salvage cases depends wholly on the circumstances attending the service. Where there has been great personal exposure and risk, and it is certain that property has been rescued from inevitable destruction by the boldness and intrepidity of the salvors, a liberal allowance will be made. One-half of the property saved has been allowed in such cases. In others, a small per centum on the value has been deemed sufficient; and sometimes a sum *in numero* has been decreed. In a case before Judge Story, reported in 1 Mason, 372, that learned judge states the law on this subject as follows:

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"Cases may occur of such extraordinary peril and difficulty, of such exalted virtue and enterprise, that a moiety, even of a very valuable property, might be too small a proportion; and, on the other hand, there may be cases where the service is attended with so little difficulty and peril, that it would entitle the parties to little more than a *quantum meruit* for work and labor."

The value of the property rescued is also to be considered in estimating the amount of compensation for a salvage service. The evidence in the case before the court is not explicit as to this value. In his answer, the master of the steamboat states the entire cargo to have been worth about three thousand dollars. It would seem, however, from the evidence of the deputy marshal who made the seizure under the process of this court, and of witnesses who have testified as to the market value of the property, that the part rescued by the persons employed was not of less value than \$6,500. Of this, the proportion saved from entire loss may be safely estimated at about \$2,500. And it may be assumed from the evidence, that the increased damage to that part of the cargo not in immediate danger of being wholly lost, which would have resulted from its longer continuance in the water, would not be less than \$1,000. On this basis, the actual benefit to the owners of the property, from the labors of those who aided in its rescue, amounted to \$3,500. This result is obtained without reference to the chances of the loss of the entire freight of the boat, if it had not been promptly removed.

There is some difficulty in fixing the sum to be allowed as salvage in this case. It is clear the facts do not warrant a very high rate of compensation to the salvors, but it is equally clear that they are entitled to something beyond a mere *quantum meruit* allowance for their labor. As before noticed, thirty-three of those who aided in this service have abandoned their right as salvors by receiving pay from the owners. It is obvious that the proportion to which they would have been entitled, if they had not thus given

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up their right to salvage, can not be awarded to those having a right thus to claim. In settling a basis of a decree, the entire value of the salvage service is first to be ascertained, and from this is to be deducted the sum to which the persons paid would have been entitled, if they had not relinquished their claim as salvors. The balance will be the amount to be decreed as salvage. Upon the whole, it seems to the court that the equity of this case will be fully met by a decree for a gross sum of six hundred dollars to those who have not waived their rights as salvors by receiving payment for their services. A decree, finding this sum as the amount of salvage, and providing for its apportionment among the owners of the cargo, according to the interest of each, will therefore be entered. The distribution will be made in equal proportions to the libellant, and such other persons as within sixty days, by proper proceedings in this court, shall establish their right to a distributive share of said sum.

(DISTRICT COURT.)

UNITED STATES v. PICKETT, WILLIAMSON, AND HARDING.

Where a defendant and another person signed a recognizance before a justice of the peace, conditioned for the appearance of the defendant, before the District Court of the United States, to answer to a charge of stealing from the mail; and three days subsequently to said signing, a third person, whose name did not appear in the body of the recognizance, also signed the same: *Held*, that a joint action could not be sustained against all of said persons upon such recognizance, and that it did not, upon its face, import a joint liability on the part of all the signers thereof.

There is no statutory provision, either of the United States or of the State of Ohio, requiring parties to sign a recognizance.

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An acknowledgment, without the signatures of the parties, certified by a justice of the peace, is all that is required to make a recognizance valid and obligatory.

D. O. Morton, District Attorney, for United States.

W. M. Dickson, for defendant Harding.

OPINION OF THE COURT:

The declaration in this case avers, that on September 9, 1854, Sophia B. Williamson, and on the 12th of September, in said year, William Harding, together with one Pickett, as to whom the process is returned not served, entered into a recognizance before Nathan Guilford, a justice of the peace for Hamilton county, by which they acknowledged themselves jointly and severally to owe the United States the sum of two thousand dollars, on the condition that the said Pickett should fail to appear before the District Court of the United States, next to be held for the Southern District of Ohio, to answer to a charge of feloniously stealing from the mail of the United States. The declaration then avers that the said Pickett did not appear, and that the recognizance was duly forfeited, whereby the United States became entitled to said sum of two thousand dollars.

The defendant, Harding, appeared by his counsel, and having cravedoyer of the recognizance, has demurred generally to the declaration. It is on this demurrer that the question now to be decided is presented. No brief has been filed, nor any authority cited, by counsel on either side. After a good deal of examination the court has not been able to find any decided cases bearing on the point raised by this demurrer.

The question presented is, whether the recognizance, as to the defendant, Harding, is valid and obligatory. The facts, as they appear from the recognizance, and as averred in the declaration, are that on the 9th of September, Pickett, the accused person, and the said Sophia B. Williamson, appeared before the justice and signed the recogni-

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zance, acknowledging themselves jointly and severally to owe the sum before stated, on the condition set forth. To this the justice of the peace annexed his certificate, in the following words: "Taken and acknowledged before me, this 9th of September, 1854, Nathan Guilford, Justice of the Peace." On the 12th of September the defendant, Harding, appeared and signed the recognizance; and the justice thereupon added a memorandum, as follows: "Signed by William Harding, this 12th day of September, 1854, and acknowledged before me, N. Guilford, J. P." The name of Harding was not, however, inserted in the body of the recognizance.

It is not necessary to decide whether Harding is liable, on the facts as they are before the court, to a separate suit, as on a recognizance entered into by him at a time subsequent to that by which the other parties became bound. The question immediately arising on this demurrer is, whether the recognizance on which this suit is brought, by fair legal construction, imports a joint liability on the part of Harding with the other parties, so that he may be joined with them in this suit.

My reflections on this point have lead me to the conclusion that there is no such liability, and that the demurrer to the declaration must be sustained. It is clear that the recognizance entered into by Pickett and Williamson, on the 9th of September, and certified by the justice, was a perfect and valid instrument. It was an acknowledgment of a joint and several liability on the condition set forth. This acknowledgment, without the signature of the parties, with the certificate of the justice, was all that was required to make the recognizance valid and obligatory. There is no statutory provision, either of the United States or of the State of Ohio, requiring the parties to sign a recognizance. Harding's name does not appear in the recognizance as one of the parties making the acknowledgment; and he is not otherwise connected with it than by the fact that he appeared on a subsequent day and put his name to it. The

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memorandum of the justice, that Harding appeared on the 12th of September and signed the recognizance and acknowledged such signing, did not make him a party to the instrument. It was, no doubt, competent for the justice to have taken a separate recognizance from him; and this would have been the correct course of procedure. But, without his name in the body of the instrument, his signature to the recognizance, at a subsequent day, did not make him a party to it, and thereby create a joint and several liability with the other parties. As before intimated, it may be that the certificate of the justice as to such signing might, by a very liberal construction, be deemed sufficient evidence that he did enter into a separate recognizance, but does not connect him with the instrument, already perfect and complete in itself, as a party to it.

The demurrer to the declaration must be sustained.

(CIRCUIT COURT.)

EBENEZER JENKINS v. ISAAC GREENWALD.

Although inventors only are named in section 17 of the act of 1836, no doubt can be entertained that it extends to and includes the assignees of such inventors.

If there is no sufficient ground for the allowance of an injunction, and the case is to be viewed as a mere proceeding to recover compensation for an infringement of the exclusive right of the complainant, there would seem to be an adequate remedy at law, which would render the interposition of a court of equity improper.

If the party sued as an infringer admits the infringement, but asserts that, after notice or service of the injunction, he had refrained from the use of the thing patented, and that he will not again infringe, it is no reason why the injunction should not issue or be made perpetual.

The complainant, in such a case, is not obliged to rest his interests on the mere asseveration of the party that he will not repeat the act of infringement. Having once been a wrong-doer, the law supposes the possibility of his being so again, and will impose the proper restraint to prevent the repetition of the wrongful act.

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The equity rules adopted by the Supreme Court, under the authority of an act of Congress, are, of course, obligatory on the Circuit Courts. The latter have not the authority to rescind a rule adopted by the Supreme Court for the government of their practice in chancery.

The profits recoverable in an action for a violation of an exclusive right, under a patent, are not regarded as unliquidated damages.

The right to recover rests upon the principle that the party complained of has unlawfully appropriated to himself the benefits of an improvement or discovery which belong exclusively to another; and that so far as he has made profit by such appropriation, he is liable to the party injured. This profit is ascertainable by evidence; and does not, like the claim for damages in an action for a tort, rest in the mere discretion of a court or jury.

The patentee has, under his patent, three distinct rights which he may dispose of separately to different individuals. These are: the right to make the machine, the right to use it, and the right to vend it.

A grant to A. of the exclusive right to make, vend, and use a certain machine within the county of Hamilton, Ohio, conveys the right to make and vend such machines within said county for licensees who intend to use the same without said county; and the manufacture by others of machines within said county, for use without, is an infringement of the rights conveyed to A.

The damages for such infringement are the profits of the manufacture.

THIS was a bill in equity, filed to restrain the defendant from infringing the letters patent granted to William Woodworth, and more particularly referred to in the report of the case of *Foss v. Herbert*, 2 Fisher, 81. A limited injunction against the defendants had been granted by Mr. Justice McLean, which the complainant now moved to perpetuate. The facts upon which the motion was based sufficiently appear in the opinion of the court.

Coffin & Mitchell, for complainant.

R. D. & J. H. Handy, for defendant.

OPINION OF THE COURT:

This case is before the court on a motion by the complainant for a decree to perpetuate the injunction heretofore allowed by Judge McLean, and for the profits arising from an alleged infringement, by the defendant, of the

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complainant's exclusive right to construct Woodworth's patented planing machine within certain territorial limits, which will be hereafter noticed. This motion is resisted on several grounds, which will be adverted to.

Before proceeding to the consideration of the points arising in the case, it will be proper to state the material facts involved. This I shall do without presenting even an analysis of the allegations of the parties, as set forth in their pleadings.

On April 21, 1846, James G. Wilson, in whom was vested, by assignment, the title to the Woodworth patent, entered into a contract with the complainant and one Benjamin Bicknell, by which, on the conditions specified, Wilson sold and granted them "the exclusive right to make, use, and vend to others to construct and use, during the full term of said letters patent, from this day until December 27, 1856, machines for planing, tongueing, and grooving, upon the principle, plan, and description of the said renewed patent, and amended specifications, within the territory of Hamilton county, in the State of Ohio, and so much of the adjacent territory in the State of Kentucky as lies along and adjoining said Hamilton county, and within five miles of the Ohio river." After reserving the right of Hudson and Hughes to the use of one machine in the city of Cincinnati, previously granted by Wilson, the contract recites that several other licenses had been granted within Hamilton county on certain conditions stated. Wilson also reserves the right to license the use of other machines within the territory designated in the contract, upon the condition "that the aggregate machines allowed by sale or license, executed by him, or his former assignees, Brooks and Morris, licensed to be used in that territory, do not exceed thirteen," etc. It is then provided that "Bicknell and Jenkins shall not erect for use, or directly or indirectly authorize to be used, within the said territory, any machines, until the number is, or shall be, reduced to eight, and when any right of any person to use any of the said

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thirteen machines shall cease, Bicknell and Jenkins shall not put in operation a machine or machines in lieu thereof, until the whole number of machines in said territory shall be reduced below eight, and when so reduced, the number of machines shall be kept at eight." It is also agreed that, in the licenses to be granted, it shall be stipulated that the licensees shall not work lumber, by said machines, at a less rate than seven dollars per 1,000 feet of board measure, and that they shall render full accounts of their earnings, etc. Bicknell and Jenkins agree to pay for the rights granted at the rate of \$2,500 a year, with the condition, that if their receipts from licenses do not amount in any year to that sum, they are to pay or account to Wilson at the rate of \$1.25 per thousand, etc. Wilson binds himself, "on due notice to institute and prosecute all actions necessary to secure the monopoly granted by said patent, within said territory, at his own expense, and expressly reserves to himself all damages which may accrue therein, and the exclusive right to prosecute for piracies." Bicknell and Jenkins reserve the right, on giving three months' notice of their intention, to surrender the agreement, at the end of any year. Wilson, after the assignment to Jenkins and Bicknell above mentioned, assigned whatever remaining interest he had in said letters patent within said territory to Elisha Bloomer. On August 25, 1847, Bicknell assigned to Elisha Bloomer an undivided half of his right to build machines under said contract; and on September 1, 1849, Bloomer assigned his interest to Bicknell. On December 2, 1853, Bicknell assigned all his right to build and sell machines, all claims for damages for infringements, and for profits of making the machine, to the complainant.

It is among the averments of the bill, that the defendant had made a number of machines, at Cincinnati, upon the plan of the Woodworth patent, without license therefor from Wilson, in violation of the complainant's exclusive right; and that then, on August 29, 1854, he was engaged in making one at his shop in Cincinnati. The bill prays

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for an injunction restraining the defendant from the further construction of the machines, and for an account of the profits, and for general relief.

The defendant, in his answer, admits, in substance, that he had constructed several planing machines on the Woodworth plan, at Cincinnati, without a license from Wilson, and that at the time of the filing of the bill, he had one in his shop. He denies that he has infringed any right of the complainant, and avers that the complainant has no exclusive right to build the machines for use or sale, outside of the limits of the territory designated in the contract with Wilson.

This case has been referred to a master, to take testimony as to the number of machines constructed by the defendant, and the profit derived therefrom. The report of the master shows the number of machines made by the defendant; and that either at the time the notice of the application for the injunction was served, or at the time of filing the bill, there was one in his shop. But it appears from the evidence, that all the machines made by the defendant were sold, to be used at places not within the limits of the territory described in the contract referred to.

The first objection to the decree asked for by the complainant is, that this court has not jurisdiction.

By section 17 of the patent act of 1836, jurisdiction is given to the Circuit Courts of the United States, in all cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries; and they are authorized, "upon a bill in equity filed by any party aggrieved in any such case, to grant injunctions, according to the course and principle of courts of equity, to prevent the violation of the rights of any inventor as secured to him, by any law of the United States, on such terms and conditions as said courts may deem reasonable."

Although inventors only are named as entitled to the benefits of this statute, no doubt can be entertained that

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it extends to and includes the assignees of such inventors. 4 Wash. 584; 4 How. 712. Such was clearly the view of Judge McLean in granting the injunction in this case.

The statute limits the discretion of the court to the granting of injunctions, "according to the course and principle of courts of equity," etc. And it is insisted by counsel, that, as the case before the court shows that, at the time the writ of injunction issued, the defendant was not in the act of infringing the complainant's exclusive right, and has denied any intention of doing so in future, there is nothing on which the injunction can operate, and that, therefore, it should be dissolved, and the bill dismissed.

It is true, if there was sufficient ground for the allowance of the injunction, and the case is to be viewed as a mere proceeding to recover compensation for an infringement of the complainant's exclusive right, there would be great force in the objection now urged to the jurisdiction of this court. In the case supposed, there would seem to be an adequate remedy at law, which would render the interposition of a court of equity improper.

The allegations of the bill, and the admissions of the defendant, in his answer, as to the fact of infringement, have been before noticed. Upon the point now under consideration, the only inquiry is, whether it is necessary to justify an order for an injunction, or for its continuance when allowed, that the defendant should have been in the act of infringing the complainant's exclusive rights at the time of its allowance. The argument of the counsel for the defendant is based on the supposition that this is necessary. But, it seems clear, the position of counsel is not sustained, either by reason or authority. In his treatise on Patents, section 335, Mr. Curtis says: "If the plaintiff shows the necessary possession, and an infringement has actually been committed by the defendant, the injunction will be granted, notwithstanding the defendant admits the infringement, and promises not to repeat it." The writer

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refers to the case of *Losh v. Hague*, Webs. Pat. Cas. 200, as sustaining his position. In that case, the vice-chancellor is reported as saying: "Now, it seems to me that there can be no question but that the wheels complained of as having been made by the defendant, do answer the description of the plaintiff's wheels, and I do not think it enough, on a question of injunction, for the defendant to say that he has done the thing complained of, but will not do it again." And further, "But if once the thing complained of has been done, I apprehend this court interferes, notwithstanding any promise the defendant may make not to do the same thing again."

I think the Supreme Court of the United States, in the case of *Woodworth et al. v. Wilson et al.*, 4 How. 712, decided the point under consideration, though not expressly referred to, in the opinion given. That was a proceeding in chancery for an infringement of the Woodworth patent. An injunction had been granted to restrain the defendant from the use of the machine; and in the progress of the case, a rule for the attachment against him, for violating the injunction, had been issued. In the statement in the proceedings in the court below, it appears that the defendant showed cause against the rule, by an affidavit in which he stated that immediately on the service of the injunction he ceased to use the machine. The report further states that the case was heard on the merits and upon the rule granted; and the court dissolved the injunction, dismissed the bill, and discharged the rule. The case was appealed to the Supreme Court of the United States, where the decree of the Circuit Court was reversed. Although not specially noticed by the judge in delivering the opinion of the court, it is obvious the point under consideration was decided. For, if the fact stated in the defendant's affidavit, that he had ceased to use the machine upon the service of the injunction, had been viewed by the Supreme Court as a sufficient ground for the decree in the court below, dissolving the injunction and dismissing the bill, it is clear

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there would have been no sufficient ground for reversing that decree. In the opinion of the court, it is remarked that "some other objections were taken to the maintenance of the suit on the argument, which it is not material to notice particularly. They have all been considered; and, in the judgment of the court, afford no sufficient ground for the dismissal of the bill, and the dissolving the injunction."

These authorities seem decisive on the point referred to. They establish the position, that if the party proceeded against as an infringer of the exclusive right of the person having the title to the patent, admits the infringement, but asserts that after notice or service of the injunction, he had refrained from the use of the thing patented, and asserts that he will not afterward infringe, it is no reason why an injunction should not issue, and be made perpetual. The complainant in such a case is not obliged to rest his interests on the mere asseveration of the party, that he will not repeat the act of infringement. Having once been a wrong-doer, the law supposes the possibility of his being so again, and will impose the proper restraint to prevent the repetition of the wrongful act.

This view sufficiently explains the reason why the court has declined to make an order for a further reference of this case to the master, and for leave to amend the answer, in accordance with the motion of counsel, filed since the argument on the hearing. The principal ground of the motion was, that there was an error committed by the master in taking the testimony in relation to the day on which the last machine made by the defendant was taken from his shop, and a similar error by the defendant in his answer on the same point. It is obvious, that if the conclusion of the court, as indicated, is correct, there could be no necessity for the reference moved for, as the legal aspect of the question would not be affected by the admission that the facts were as claimed by the defendant.

It is further insisted in argument, by the counsel for the

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defendant, that the complainant has precluded himself from taking a decree, in his favor, by allowing the defendant to be examined as a witness before the master, on the reference to him, and numerous authorities are cited, to the effect that if a complainant in chancery examines a defendant as a witness, it is a waiver of his right to a decree against him. Such, under ordinary circumstances, is, without doubt, the rule in chancery. But it is not applicable to the present case. In the first place, there is no evidence before the court that the defendant was examined as a witness before the master, at the suggestion or request, or with the knowledge of the complainant. There is, however, another answer to this objection. By the seventy-seventh rule of the rules adopted by the Supreme Court of the United States, regulating the chancery practice of the Circuit Courts, it is provided, that "the master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference," etc. These rules were adopted by the Supreme Court, under the authority of an act of Congress, and are, of course, obligatory on the Circuit Courts. And the eighth rule of this court, declaring that "interest in the event of a suit shall not render a witness incompetent, unless he be a party to the suit," neither conflicts with, nor abrogates, the seventy-seventh rule of the chancery practice. The Circuit Court has not the authority to rescind a rule adopted by the Supreme Court for the government of its practice in chancery. And the eighth rule, above quoted, excluding, by implication, a party from being a witness, was obviously intended to apply to cases at law.

It is also contended in argument, that the complainant is not entitled to a decree for profits in this suit, if an infringement is proved, for the reason that the right to sue for and recover damages for piracies has not vested in him, by the assignments of Wilson to Bloomer, and of

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Bloomer to Bicknell. It is claimed by counsel that the latter assignment is only of the right of Bloomer to "build machines in Hamilton county, and can not be held to imply a right in the assignee to sue for damages accruing from infringements." These assignments have been before noticed. Wilson's assignment to Bloomer was, "of all his remaining interest in the patent" within the territory designated, and Bloomer assigned his right to build the machines, without any reservation of a right to any damages that may have accrued from infringements, or of a right to sue for them. It was, without doubt, competent for him to have reserved this right; but not having done so, and now asserting no claim, there is no reason, perceptible to the court, why the complainant, as the assignee of Bicknell, being vested with the entire interest in the patent, should not protect his rights by suit in his own name. Bloomer certainly has no interest in the patent, nor could he be compelled to join in any proceeding, having for its object the establishment of the rights of the complainant under the patent. Besides, there is no allegation or proof to the effect that any of the infringements complained of, in this suit, transpired during the period that Bloomer held his interest in the patent.

It is further insisted by counsel, that if there has been an assignment, which transfers to the complainant the right to sue for infringements of the patent, it is void, for the reason that, in its legal effect, it is an assignment of a right to unliquidated damages. This view is clearly not sustainable. The profits recoverable in an action for a violation of an exclusive right, under a patent, are not regarded in the light of unliquidated damages. The right to recover rests upon the principle that the party complained of has unlawfully appropriated to himself the benefits of an improvement or discovery which belongs exclusively to another; and that, so far as he has made profit by such appropriation, he is liable to the party injured. This profit is ascertainable by evidence; and does

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not, like the claim for damages in an action for a tort, rest in the mere discretion of a court or jury.

The remaining inquiry relates to the construction of the contract between Wilson and Bicknell and Jenkins. The counsel for the complainant insists that the clause granting the exclusive right "to make, use, and vend to others to construct and use" the Woodworth planing machine within the territorial limits designated, imports a right in the grantee to construct for sale or use elsewhere, and wherever a market can be found; and that consequently the construction of the machine, within those limits, by the defendant, though sold for use outside such limits, is an infringement of the exclusive right of the complainant, and that he is entitled to a decree for the profits derived from such infringement, as proved by the testimony in the case. On the other hand, it is contended that the limitation as to territory applies alike to the right of making, and to the right of vending and using; and that the complainant can not claim, under the contract, any exclusive right to make the machines for sale or use, except within the territory described. And it is argued that, as a necessary result, if machines are made by one having no license or authority, within those limits, for sale or use elsewhere, it is merely a technical infringement of the complainant's right, and does not afford a basis for a decree for an account of profits on the sales of the machines so made and sold.

As before noticed, the proof is clear that the defendant has made no machines which have been sold or used within the territory mentioned in the contract. He asserts in his answer a right to sell them elsewhere, without the license or consent of the complainant, and without being answerable for the profits. If this construction of the contract is sustained, it is clear the complainant is entitled only to nominal damages for the infringement. In that case he would have no right to invoke the aid of a court of chancery, as the law would afford a plain and adequate remedy.

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It is obvious, therefore, that the construction of the contract referred to, presents a material question for the decision of the court. In the case of *Bicknell and Jenkins v. Todd et al.*, 5 McLean, 236, which was an application to Judge McLean for an injunction, the learned judge, after giving a synopsis of the contract, says: "Under this contract, Bicknell and Jenkins have a right to make for use, within the district specified, the planing machines, under the restrictions named; and they have also a right to all the receipts under the thirteen licenses granted, they paying to Wilson the sum stipulated." The question arising in this case, whether Bicknell and Jenkins, under the contract, had the exclusive right, within the territory defined, to make machines for sale and use outside of it, did not arise in the case referred to, and was not decided by Judge McLean. It is, therefore, an open question in this court, and, perhaps, not wholly free from difficulty. I will state briefly the conclusions to which I have been brought on the point stated; and, in doing so, may properly express my regrets that I can not have the aid of my brother judge in its consideration and decision.

This contract, in its terms, grants to Bicknell and Jenkins "the exclusive right to make, use, and vend to others to construct and use" the Woodworth planing machine, for the full term of the patent, within the limits specified. It does not, in express words, extend the grant to the right of constructing machines, within those limits, for sale or use elsewhere. It is equally clear there is nothing in the contract which expressly negatives such a right. The intention of the parties must, therefore, be sought for; and if that can be ascertained by reference to the entire instrument, it will furnish a guide in giving it a construction, in reference to the point under consideration.

And here it is material to notice, that the person having the title to a patent for a new or improved mechanical structure, has three distinct rights, which he may dispose of separately to different individuals. These are: the right

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to make the machine, the right to use, and the right to vend. In the case of *Bicknell and Jenkins v. Todd et al.*, before referred to, Judge McLean distinctly recognizes this doctrine, as applicable to the contract now in question. He remarks, that "these rights have been treated as distinct by the parties to this contract;" and adds: "This is clear from the words of the contract, and especially from that part of it which reserves the right of Hudson and Hughes to make a machine, which had been granted to them by Wilson."

At the date of this contract, Wilson held the entire interest in the Woodworth patent, including the territory named, except so far as he had previously granted certain rights within it. By his contract with Bicknell and Jenkins, he transferred his interest to them, subject to the restrictions and limitations specified. In this transfer, it seems clear he intended to distinguish between the right to make the machine generally, and the right to make for use, within the limits designated. While there is no limitation as to the former, the latter right is cautiously guarded and restricted. Wilson, prior to the date of the contract, had granted several licenses to use the machine in Hamilton county, and, in his contract with Bicknell and Jenkins, reserved the right of licensing other machines in the district mentioned, upon the condition that the number should not exceed thirteen. Bicknell and Jenkins bound themselves not to "erect for use, use, or directly or indirectly authorize to be used, within said territory, any machines, until the number is or shall be reduced to eight." Under this restriction, it is obvious they could expect but little profit from the right granted them within the district described, except what they might realize from the receipts to which they were entitled, from the machines licensed by Wilson. They could build and use no new machine within the district till the number licensed was reduced from thirteen to eight. And as to making machines, their right was only that of replacing such of the number

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licensed as might become unfit for use. This would seem to be an inadequate consideration for the \$2,500 which they were to pay, yearly, for the rights granted to them; and would justify the conclusion that the right to *make* the machines was intended to have a wider meaning.

In the argument of the counsel for the complainant, it is contended that the right to make and the right to use the machine, in the contract under consideration, are distinct and independent, and that the parties intended to separate them. It is insisted, therefore, that while Bicknell and Jenkins are restricted in their right to make, for use, within the territory named, there is no limitation to their right to make, for sale, without that territory. This is probably the true construction of the contract. But then the inquiry arises, does the grant of the naked right to construct, import a right to Bicknell and Jenkins to sell for *use*, outside of the the territory named? The right to make carries with it the right to sell; but does it necessarily imply the right to *use* the machine when made and sold? According to the argument of the complainant's counsel, the mere right to make, with the right to sell, may be vested in one person, while the right to grant a license for the *use* of the machine may be in another. Has Wilson, in his contract, parted with the right to authorize the *use* of the machines, to be made by Bicknell and Jenkins, for sale outside of Hamilton county, and the adjacent territory, in Kentucky? Upon the supposition that he had granted the right, Bicknell and Jenkins were authorized to make and license for use anywhere within the United States. I can not perceive anything in the terms of this contract justifying the conclusion that a right so immensely valuable was transferred by Wilson. The consideration named in the contract would certainly be no equivalent for such a right. But, on the supposition that Wilson transferred, without limitation as to any territory outside of that named in the contract, the mere right to construct the machines for sale, reserving the right to license such machines for use, the contract becomes intelli-

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gible, and the intention of the parties obvious. In this view, it excites no surprise that Wilson should have granted, without restriction or limitation, the right to manufacture the machines for sale anywhere, beyond the limits of the district specified. His policy was to encourage the making of the machines, since his profits from licenses would be increased in proportion to the number made and sold. The city of Cincinnati, being one of the principal centers of business in the West, and of easy access from various points, would be a desirable place for the manufacture of the machines. From thence, they would readily find their way into the smaller towns and villages.

If this view of the contract is correct, it follows that the defendant has infringed the complainant's exclusive right to make the machine, by constructing machines within the district defined, and selling them elsewhere, and must account for the profits accruing to him from such violation of the right of the complainant. And the question is presented, upon what principle shall these profits be estimated? Counsel assume that the complainant occupies the position, and is entitled to all the rights of an assignee of the entire interest in the Woodworth patent, and as such is entitled to an account for all profits, including the price charged as the profit of the assignee, on the sale of his rights under the patent. But I am unable to perceive the justice of a decree in this case on that basis. If the right granted to Bicknell and Jenkins, as to all territory outside of that described in the contract, was the naked right to construct the machine, with a right to sell, but not to license for use, the rule of damages must be their actual profit from the manufacture of the machine, excluding any profit as a patentee.

I am aware that, in his treatise on Patents, Mr. Curtis asserts a principle that may seem to be in conflict with that on which it is proposed to place the decree in this case. He says: "When a patentee sells to another a patented machine made by himself, or permits such person to make the machine, the party thus authorized becomes a licensee, with

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the right of selling the machine, which carries with it the right of using it." Sec. 195. Without controverting this doctrine, I doubt its applicability to the case before the court. This case must be disposed of with reference to the contract between the parties. As before stated, this contract was made and so regarded by the parties, with reference to the rights of the patentee, or his assignee, of making, of vending, and of using a patented machine, as distinct and separable, and as capable of being vested in different persons; as before noticed, this principle was expressly sanctioned by Judge McLean, in the case referred to, and he held that the parties to this contract seemed so to have understood it. The doctrine laid down by the writer just mentioned, does not therefore apply to this contract. If the right of Bicknell and Jenkins was a mere right to construct the machine within certain limits, implying a right to sell outside of such limits, but without any right to use, or authorize others to use, the machine, the injury sustained by the complainant, as the result of the defendant's infringement of his exclusive right, is to be measured by the profit, which, as a manufacturer and not as a patentee, he realized from making it.

The report of the master shows that the defendant, on his own account and in connection with his partner, Bonsall, constructed and sold nine machines; and that the amount usually paid to the patentee, for the right to make machines, is \$225 each. It does not appear, from the report, whether this is inclusive or exclusive of the profit made by the manufacturer. This profit, as it seems to the court, furnishes the rule for fixing the amount of the decree. For the purpose of ascertaining this, there must be a further reference to the master, unless the parties can agree on the amount.

Case referred back to the master for the purpose of stating an account, in accordance with the principles stated.

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(CIRCUIT COURT.)

ELIZA SHAKELEY ET AL. v. A. M. TAYLOR ET AL.

The law is well settled, that a person occupying the position of a fiduciary can not be a purchaser of the trust property, even in the absence of any ground for the presumption of actual fraud.

Where three persons were administrators of an insolvent estate, and had obtained an order from the probate court for the sale of the decedent's land to pay debts, and at the sale a note was taken for a part of the purchase money, payable to the administrators, upon which suit was brought, judgment obtained, and the property offered for sale by the sheriff on execution, and at the sale one of the administrators became the purchaser at two-thirds of the appraisement: *Held*, that such administrator did not occupy a fiduciary relation to the land, and that the sheriff's deed vested a good title in him.

If the purchaser could be viewed on any ground as a trustee, under the facts of this case, the creditors of the insolvent decedent, and not the heirs, would be the proper persons to impeach the sale.

Mills & Hoadly, for complainants.

Ball & Skinner, and *Collins & Herron*, for defendants.

OPINION OF THE COURT:

The questions submitted in this case arise on a demurrer to a bill in equity. The facts set forth in the bill may be briefly stated as follows: In 1816, James K. Bailey died without issue, intestate and insolvent, seized of an interest of one undivided half in certain real estate in Cincinnati, which he held in common with one John B. Enness, leaving a widow, Eliza Bailey, since deceased, and a sister, Susan Shakeley, wife of Robert Shakeley, a citizen of Adams county, in the State of Pennsylvania, his only heir at law. Susan Shakeley died in said county in 1825, leaving several children, all of tender age, who, including the heirs of one since deceased, are the complainants in this case.

Eliza Bailey, widow of James K. Bailey, and William Barr and James Keys, were duly appointed administratrix and administrators of the estate of said Bailey; and having

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filed their petition in the Probate Court for the sale of the interest of said Bailey, in the real estate described in the bill, to pay the debts owing by his estate, in March, 1817, an order of sale was made by said court, and in pursuance thereof, in September, 1818, the property was sold to Samuel Still, for the sum of two thousand dollars; for which he executed his notes in equal amounts, payable in one, two, and three years, secured by mortgage. The sale was approved of, and confirmed by the court of probate, and a deed was made by the administrators. The sale, it appears, was made free from any claim of dower by the widow, but with the understanding that, in lieu of dower, she should receive the interest on one-third of the purchase money during her life, and that, at her death, the principal should be returned to the estate, and applied to the payment of the debts.

The purchaser, Still, having failed to pay the notes given for the purchase money, was sued on one or more of them; and in 1824, the administrators of Bailey obtained a judgment against him, in the Court of Common Pleas of Hamilton county. Execution was issued on this judgment, which was levied on the property described in the bill; of which said Still was then the sole owner, having previously purchased the undivided interest of said Enness therein. In 1826, the property was offered at public sale by the sheriff of Hamilton county, upon the execution issued as before stated, and was sold to said William Barr for \$1,868, that being two-thirds the appraised value. This sale was confirmed by the court, and an order made requiring the sheriff to execute a deed to the purchaser. The sheriff by his deed, dated August 31, 1826, conveyed the premises to William Barr, under whom the defendants in this case severally claim title. It is alleged that these defendants purchased with notice of the facts charged in the bill; and the complainants pray that the purchase made by Barr, as above mentioned, may be held to be a purchase in trust for them; and that on being reimbursed to the amount paid by them,

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with interest, the present claimants may be decreed to convey the portions of the property held by them respectively to the complainants, and also to account to them for the rents and profits.

It is also averred in the bill, that the complainants are now, and have been since their birth, residents of Pennsylvania, and until recently were minors; and had no knowledge of the facts set forth in their bill till about the year 1853.

Upon the facts thus alleged in the bill, the main inquiry presented by the demurrer relates to the character and legal effect of the purchase of the property by Barr, one of the administrators of the decedent, Bailey. The complainants insist that Barr occupied a fiduciary relation to the property, and that the purchase falls within the settled rule of law, which, on grounds of public policy, prohibits a trustee from purchasing property held in trust. And they ask that the conveyance to Barr may be held to be a deed of trust, and as such inuring to the benefit of the complainants, as the legal heirs of Bailey. In support of the demurrer to the bill, it is contended: 1. That Barr did not stand in the relation of a trustee, and that the sale and conveyance vested in him a perfect title in his own right. 2. That as the estate of Bailey was largely insolvent, if a trust estate can be created, Barr holds the property as the trustee of the creditors of Bailey, who alone are interested in the question; and that the creditors, not being made parties to the bill, no decree can be entered in the case. 3. That if these complainants ever had a claim to relief, they are barred by the lapse of time and the statute of limitations.

It is not proposed to examine the numerous cases referred to by the counsel for the complainants, to sustain the doctrine that a trustee can not purchase the property held by him in trust. It is undeniably true, that while some courts of the highest respectability have limited the application of the doctrine to cases where, from the facts, there was either actual or constructive fraud on the part of the trustee, the

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current of decisions is against the validity of purchases by any one holding a fiduciary relation to the property sold, without any inquiry as to the circumstances of the sale, or the motive of the trustee in becoming a purchaser. The courts hold, with great propriety and force of reasoning, that sound policy requires that persons in a fiduciary character should have no temptation to use trust property for their own benefit and to the injury of the *cestui que trust*. And if the present case falls within this principle, the relief sought for by these complainants must be awarded, unless denied to them on other grounds.

But the court do not perceive the applicability of the rule referred to, to the case stated in this bill. Barr, the purchaser of the property in question, was one of three administrators of an insolvent estate. Upon a proper showing to the Probate Court, by the administrators, that it was necessary to sell the real estate of the decedent to pay debts, an order for that purpose was made, under which Still became the purchaser of the property. The administrators made return of the sale, and the usual order for its confirmation was made, and also an order that the administrators should convey the "premises to the purchaser." A deed was accordingly executed, which vested the legal title to the property in the purchaser, Still. From that time, the administrators were separated from all connection with it as fiduciaries. It appears that subsequently, in default of the payment of the notes given by the purchaser for the real estate sold, it became necessary to bring suit on one or more of these notes, in which suit the names of the three administrators were used as plaintiffs. A judgment was obtained by the administrators; and upon an execution against the defendant, the property purchased by him at the sale by the administrators, as also the undivided half which he had acquired by purchase from Enness, was levied upon. Having been duly appraised and advertised, as required by law, it was offered at public sale by the sheriff of Hamilton county, and Barr, being the highest bidder, was the pur-

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chaser. The sale thus made was confirmed by the proper court, and in pursuance of the order of the court, the sheriff conveyed the property to Barr.

It may be remarked here, that there is no allegation in the bill, nor any ground presented for an inference, that these proceedings were not conducted in the most perfect good faith. The sum bid for the property by Barr being two-thirds its appraised value, after applying one-third to the satisfaction of the widow's claim of dower, was paid to the administrators, and by them distributed to the creditors of the estate. Neither is there any averment in the bill that Barr made any profit for himself by the purchase.

The main ground on which courts have rested their condemnation of fiduciary purchases is, that the trustee has control of the sale of the property, and thus is exposed to the temptation of resorting to fraudulent management in the sale, thereby to subserve his own interests, at the sacrifice of the interests of those for whom he is the trustee. Hence, at a sale by administrators or executors of property belonging to their decedent, they are not allowed to become purchasers, for the reason that they appoint the time and place, and have the entire management of the sale. But this has no application to the sale at which Barr was the purchaser. The property sold to him was not trust property, the title, legal and equitable, having vested in Still, the defendant in the execution. It was levied on and sold to satisfy the execution against him. The sale, and all the proceedings connected with it, were conducted by the sheriff, the officer who by law was authorized to perform this duty, without any interference or attempted control on the part of Barr or his co-administrators.

It would seem to be a clear proposition that a sale thus made is not liable to the objections which usually invalidate a fiduciary sale. It is clearly not within the principle on which such sales are held to be void, for the reason that the purchaser, though his name as an administrator was neces-

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sarily used in the suit against Still, had no control over the sale. It was impossible, therefore, that, by any agency on his part, he could prevent the fullest competition at the sale, or by any device or management effect a purchase at an unfair price.

Two cases have been referred to by counsel, one from the Vermont and one from the Georgia Reports, in which it is said the court ignored the distinction between a purchase by an administrator or executor of property held as the representative of a decedent, and property levied on to satisfy a judgment in which an administrator or executor is a party plaintiff. I have not had an opportunity of referring to these cases, and do not, therefore, know the precise grounds on which the decisions were placed. But, considering the distinction intimated as obvious, and as entitled to a controlling influence in the consideration of the question, I am not prepared to sanction the doctrine which the cases cited are supposed to sustain. It is not within the reason of the rule of law condemning fiduciary purchases, and there is certainly nothing in the facts presented in the bill requiring so stringent an application of the doctrine. As before intimated, there does not appear to have been any unfairness, much less fraud, in the purchase of the property in question. It was sold at its fair value, and its proceeds applied to the payment of the debts owing by the estate.

But, if the facts presented warranted the implication that Barr, the purchaser of the property, can be viewed as having acquired merely a trust estate, the inquiry may properly be made, to whose benefit did the trust inure? The estate of the decedent Bailey was insolvent, and paid only fifty cents on the dollar of the debts owing. It would seem, therefore, that his heirs could have no possible interest in the sale and disposition of his estate, as there is no pretense that in any event there would have been any surplus for distribution after the payment of the debts. If, therefore, there is any ground of complaint against the

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administrators, it should be urged by the creditors, and not by the heirs of Bailey. But the creditors are not parties to this bill and ask nothing at the hands of this court. And this is a full answer to the prayer of the bill, so far as the equities of the heirs are concerned.

The case of *Chronister v. Bushey*, 7 Watts & Serg. 152, is cited as sustaining the doctrine that it is the right of the heirs to impeach a sale by an administrator or executor, even where the estate is insolvent. In that case, however, the property purchased belonged to the estate of which the administrator was the representative. It was, in fact, a sale by the administrator, and of which he had the entire control, and there were facts in the case justifying the inference of fraud on the part of the administrator. It was possible, that if the sale had been fairly made and the property sold at its full value, there might have been a *residuum* for the heirs. The court held, therefore, that as the heirs had a remote or contingent interest in the sale, it was competent for them to impeach it without the interposition of the creditors of the estate. It is not necessary to inquire into the correctness of the decision in the case referred to. The facts in that case have no analogy to those in the case before the court, and the law as sanctioned by the Pennsylvania court has no application to this case.

Regarding the reasons stated as conclusive against the right of the complainants to the relief sought for, the demurrer is sustained and the bill dismissed. It is not therefore necessary to inquire or decide whether the complainants are barred by the statute of limitations or the lapse of time.

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(CIRCUIT COURT.)

THE UNITED STATES v. R. C. CORWIN ET AL.

Treasury transcripts, showing the state of accounts as between the government and a disbursing officer of the United States, are *prima facie* evidence, and admissible as such in a suit against the officer or his sureties on an official bond.

The act of Congress provides that in a suit on such bond no item of credit shall be allowed, unless it has previously been submitted to and disallowed by the proper accounting officers.

But it is competent for the officer or his sureties to prove that a disputed item of credit claimed had been thus presented and disallowed, although the treasury transcript does not show such presentation and rejection.

Where the evidence proves, to the satisfaction of a jury, in a suit on the bond of a disbursing officer, that money, reasonable in amount, was paid by such officer, and services were rendered by him in good faith, in the proper discharge of his official duties, such payment and service, if not prohibited by law, may be allowed as credits.

Stanley Matthews, District Attorney, for United States.

Corwin & Warden, for defendants.

CHARGE OF THE COURT:

This is a suit against the defendants, as sureties in the official bond of Henry Harvey, a sub-Indian agent of the United States for the Osage Indians. The condition of the bond is, in substance, that Harvey shall faithfully perform all his duties as such sub-Indian agent, and faithfully account for all moneys received by him, and all property which shall come officially into his possession.

Transcripts from the books of the treasury department have been offered in evidence, purporting to show the moneys advanced by the United States to the subagent, and showing a nominal balance against him of \$13,553. Although, by act of Congress, these treasury transcripts are made legal evidence for the government, they are not

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conclusive as to the amount due, and it is the right of the principal and the sureties, in an official bond, to prove that there are credits which do not appear in the account, and which ought justly to be allowed. And in the present case, it is admitted by the district attorney that the sub-Indian agent is entitled to large items of credit, reducing the actual claim of the government to the sum of \$1,545.56, for which he claims a verdict. This, then, is the amount in controversy, and it will be for the jury to decide whether the defendants in this suit are liable for the sum claimed, or any other amount. And the decision of this issue must depend on the evidence in the case. For the government, although the party plaintiff occupies a footing of perfect equality with a citizen as to the admissibility and force and effect of evidence, except in cases where, from considerations of public policy, immunities and privileges may have been specially conferred upon it by law, it has been found necessary, for the prevention of frauds on the treasury, to provide by law, that in any suit by the government for a balance due on an official bond, no credit shall be allowed, unless the items claimed as credits have been previously presented to the proper accounting officer, and have been by him disallowed in whole or in part. The only exceptions in the law are, where the officer claiming the credits was absent in a foreign country, or prevented by some other unavoidable cause from their presentation. But any items of credit, which do not appear in the treasury statement, and which have been presented and disallowed by the accounting officer, may be proved by the party charged; and if just and legal, will be admitted as proper credits. And, with a commendable spirit of liberality, the courts of the United States, in controversies between the government and the sureties in an official bond, have held that where an item of expenditure, or an act of official service, was fairly within the range of the legal duties and obligations of an officer, he and his sureties are entitled to a just allowance. But, in the strictness required by law in passing on

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the claims of an officer or his sureties, there is a necessity that this limitation should be strictly observed.

It is not proposed to detain the jury by a critical reference to the items of the treasury statements in this case. This document will be with the jury, and, with other evidence adduced, will be considered by them. There are some disputed items in controversy. Without referring to these in detail, it will be sufficient to state the following general rules for the guidance of the jury in forming their verdict. *First.* Every item of credit claimed by Harvey, as Indian subagent, which has been presented to the accounting officer of the Treasury department, and by him rejected, if proved to the satisfaction of the jury to be just and equitable, ought to be allowed. *Second.* If the credit claimed is for money paid by the subagent, or for a service rendered by him in pursuance of law, or instructions from the proper department sanctioned by law, he and his sureties are entitled to its allowance. *Third.* If the jury are satisfied that the money paid by the officer, or the service rendered, was in good faith and the charge reasonable in amount, and that the payments or service pertained properly to his official duties, and were not prohibited by law, they may be allowed as credits.

Applying these rules to the disputed items of the defendant's claim, it will be for the jury to say what shall be allowed and what rejected. They will carefully examine and weigh the evidence before them, and return such a verdict as in their judgment shall be just and equitable.

The jury returned a verdict for the United States for the amount claimed as due from the subagent.

Thompson & Foreman v. Cin., Wil. & Zanesville R. R. Co.

(CIRCUIT COURT.)

**THOMPSON AND FOREMAN v. CINCINNATI, WILMINGTON AND
ZANESVILLE RAILROAD COMPANY.**

Under a contract for the delivery of nine thousand tons of railroad iron, the contract is not complied with on the shipment of the iron.

Where five hundred and ninety tons of iron shipped under such a contract were lost at sea, the risk of the transportation was on the seller.

In estimating the loss of the purchaser, by reason of the non-delivery of the iron thus lost, the rule of damage is the difference between the contract price and the market value at the time and place of the delivery.

Walker, Kebler & Force, for plaintiffs.

Henry Stanbery, for defendants.

OPINION OF THE COURT:

This case involves the construction of a contract in writing entered into at the city of New York by the plaintiffs, through their agents, and Franklin Corwin, as agent and president of the Cincinnati, Wilmington and Zanesville Railroad Company, April 1, 1852. By this contract, the plaintiffs, manufacturers of railroad iron in Wales, agreed to sell to the defendant 9,000 tons of railroad iron at \$38 per ton; 2,500 tons of which was to be shipped to New Orleans on or before the 15th of September following, and 2,500 tons to be shipped to that place by the 1st of January following; the remaining 4,000 tons to be shipped to New York by the 1st of January following. It appears that the whole of the 9,000 tons of iron was shipped by the plaintiff, of which 590 tons were lost at sea. The remaining tons of iron were received by the defendant, and paid for according to the contract, with the exception of a balance of \$24,827.25.

The plaintiffs, in some of the counts of their declara-

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tion, claim payment for the whole 9,000 tons at the contract price. In some, they seek to recover only the said sum of \$24,827.25, unpaid on the iron delivered, with the interest.

In support of the claim for full payment of the 9,000 tons, it is insisted that under the contract the plaintiffs' obligation was complied with on the shipment of the iron, and that, on proof of shipment, they are entitled to judgment for the whole quantity at the contract price. Does the contract warrant this construction? It seems clear, taking the whole contract together, that the plaintiffs were bound to deliver the iron at the times and places mentioned, and that there was no obligation to pay until and unless it was delivered. Indeed, it is a part of the contract that defendant shall make payment for the iron as the same shall be delivered, implying that the delivery was a condition precedent to the obligation to pay. There is also an express obligation on the defendant to have an agent at the two places of delivery to receive the iron—from which the obligation to deliver is plain. All the circumstances of the case negative the presumption that it was the meaning of the parties that there was to be any payment till the delivery of the iron. Is the plaintiff entitled to recover the amount unpaid on the iron delivered? The defendant has given notice that he will claim as a set-off to this, the damages sustained by him, by reason of the non-delivery of the 590 tons of iron lost at sea. It is agreed that between the date of the contract and the latest date mentioned for the delivery of the iron, the market value had risen to \$72.50 the ton. If the contract is for the delivery of the iron, it follows that the plaintiff is liable for damage sustained by defendant for the non-delivery. The risk of the transportation was on the plaintiff.

The rule of damage in such case is the difference between the contract price and the market value at the time and place of the delivery. It is to be inferred, from the

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fact that defendant contracted for 9,000 tons, that the whole was necessary for his purposes, and it is shown that he was obliged to buy the deficient quantity at the then market price. He is damaged, therefore, to the amount that he is obliged to pay beyond what he had contracted to pay. It can make no difference, in the view taken of this contract, that the plaintiffs shipped the iron, and that it was lost at sea. Such loss is his misfortune, but is no answer to the contract to deliver. Deducting the damage sustained by the defendant for the non-delivery of the 590 tons, there is still a balance due the plaintiffs, for which judgment will be entered. This balance is \$4,472.25, with interest from December 24, 1853.

(CIRCUIT COURT.)

SACKETTS HARBOR BANK v. FREELAND T. BARRY ET AL.

Under section 9 of the act of Congress of February 10, 1855, "to divide the State of Ohio into two judicial districts," which provides "that suits, not of a local nature, shall be brought in the court of the district where the defendant resides; but if there be more than one defendant, and they reside in different districts, the plaintiff may sue in either:" *Held*, that a defendant is one who is a real, and not merely a nominal party to the suit, and who has either directly or indirectly an interest adverse to the claim of the plaintiff, and may be in some way affected by the judgment or decree to be entered.

H. Stanbery and Corwine & Hayes, for complainants.

Tilden & Curwen, for defendants.

OPINION OF THE COURT:

This is a bill in chancery prosecuted in the names of the Sacketts Harbor Bank, a banking institution located at Buf-

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falo, in the State of New York, and Jessie C. Dunn and others, citizens of said State, against Ebenezer F. Osborn and several other persons averred to be citizens of the State of Ohio. The complainants allege that they are stockholders in the Union Bank of Sandusky city, and sue in that character. They charge, in their bill, that a part of the defendants were directors and officers of said Union Bank; and that, in violation of their duty as such, and in fraud of the rights of the stockholders, at a time when the bank was profitably engaged in its business, they assigned all its effects in payment of its debts; thereby putting an end to the practical exercise of its franchises and functions as a bank, and greatly lessening the value of its stock. The prayer of the bill is for an account, and for a decree for the effects of the bank, so far as there are any; and also for damages and compensation for the wrongful assignment.

The defendants, Osborn, Barry, Sadler, Hubbard, Witherell, Johnson, and Bill, have filed a plea to the jurisdiction of this court, averring: 1. That Theodore Torrey, named as a defendant in the bill, was a citizen of Missouri, at the commencement of this suit, and still resides there; and that process has not been served on him. 2. That the said Osborn, Barry, and the other defendants above named, are citizens of the State of Ohio, and residents of the Northern District of said State, within which district they were severally served with process in this case. 3. That the only parties, defendants in this suit, who are residents and citizens of the Southern District of Ohio, are Ezekiel S. Haines, administrator of E. H. Haines, Samuel Marfield, and W. W. Bierce, who are stockholders in said Union Bank of Sandusky, and have no interest in the subject-matter of this suit, except as such stockholders; that their interests are identical with those of the complainants, and that this suit is brought for their benefit as well as for the complainants; and that no relief is sought from the said

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last-named defendants, who are merely colorable parties to this suit, and made defendants for the purpose of giving jurisdiction to this court.

A general demurrer has been filed to this plea; and, on this demurrer, the only question requiring the consideration of the court is, whether, upon the case, as presented, this court has jurisdiction. In the decision of this question, the court will not regard with nice scrutiny the mode of its presentation. Mere technical exceptions to the manner in which the facts are pleaded will not avail, when it appears the court can not rightfully exercise jurisdiction in the case. This being ascertained, it is the plain duty of the court at once to dismiss the bill.

The demurrer admits the facts set forth in the plea. These facts, as applicable to the question under consideration, are that the three defendants above named, as residents and citizens of the Southern District of Ohio, are sued as stockholders in the Union Bank of Sandusky, and have precisely the same, and a common interest, with the complainants.

In the argument of the demurrer, several authorities were cited, applicable to the general question of the jurisdiction of the courts of the United States, in relation to the proper parties to give jurisdiction to those courts. No case was referred to involving the precise question now before the court. Its decision depends on the construction to be given to section 9 of the act of Congress of February 10, 1855, "to divide the State of Ohio into two judicial districts." This section provides "that suits not of a local nature shall be brought in the court of the district where the defendant resides; but if there be more than one defendant, and they reside in different districts, the plaintiffs may sue in either."

It is insisted by the complainant's counsel, that this provision gives them the option of suing in either district, as a part of those named as defendants reside in the Southern District; and this presents the question who is a defendant

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within the meaning of the section of the statute before quoted? Having reference to the organization of the federal courts, and the grounds on which jurisdiction is conferred, so far as relates to the parties to a suit, there would seem to be no difficulty in finding an answer to the question. A defendant is one who is a real and not merely a nominal party to the suit, and who has, either directly or indirectly, an interest adverse to the claim of the plaintiff, and may be in some way affected by the judgment or decree to be entered.

Applying this test, it is clear the three defendants residing in the Southern District are not necessary or proper parties. The suit is brought by stockholders in the Union Bank of Sandusky, charging malfeasance and fraud in the directors and officers of that institution, and seeking, among other things, to make them individually liable for the injury alleged to have been sustained by the stockholders by their wrongful acts. There is no allegation that the stockholders residing in this district, or, indeed, any of the stockholders, have had any participation in these acts. Nothing is averred against them; nor does the bill ask for any decree against them; and it is beyond all controversy that their interests are identical with those of the complainants, and that upon a hearing on the merits, the bill, as to them, would be dismissed.

The conclusion, therefore, is obvious and irresistible, that the three persons residing in the Southern District are made parties in this suit for the mere purpose of conferring jurisdiction on this court.

I have no hesitancy, therefore, in deciding that the demurrer to the plea must be overruled. It would be little less than an act of usurpation in this court to exercise the jurisdiction claimed for it in this case; and the complainants must, therefore, be remitted to the court for the Northern District for the assertion of their rights. This will be attended with no injury to them, while it will greatly promote the convenience of the real defendants, by enabling

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them to contest the claim of the complainants in the district in which they reside, and in the vicinity of the place where the transactions in controversy have occurred.

The demurrer to the plea to the jurisdiction of the court is overruled.

(CIRCUIT COURT.)

WALKER AND BROTHERS v. ADAIR AND ANDERSON.

A failing debtor has an undoubted right to pay any debt which he justly owes, and to secure an indorser against liability, if done in good faith.

Thompson & Nesmith, for plaintiffs.

Snow & Bradstreet, for defendants.

OPINION OF THE COURT:

This is a motion to dismiss the writ of attachment issued in this case, upon which certain goods and merchandise have been seized as the property of the defendants and are now in the possession of the marshal. The allegations of fraud in the affidavit on which the writ issued, are that the defendants have disposed of and assigned their whole property with the intent to defraud their creditors; and also that they are about to remove their property beyond the jurisdiction of this court, with the intent to defraud their creditors.

The motion to dismiss is based on a denial of the allegations of fraud, and on this motion a number of affidavits have been presented by the defendants and also counter affidavits by the plaintiffs.

The facts which it is essential to notice are, that for some time prior to the 15th of July last, the defendants had been in business in the city of Cincinnati as a mercantile firm under the name of Adair & Anderson; that on the said 15th of July, the partnership expired by its own limitation

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and Anderson retired from the firm. The business was continued at the same place under the name of Adair & Brothers, who purchased the interest of Anderson, giving him their note for \$8,935, with Charles W. Hunter as indorser. Some time in September last, it appears, the firm of Adair & Brothers became embarrassed, and were apprehensive they could not sustain themselves. An inventory of their stock and assets was taken, from which it appears their goods, at eastern cost, were valued at about \$17,000, and their notes, accounts, etc., at about \$21,000, making together \$38,000. Their liabilities at the time were estimated at about \$35,000. Apprehending they might be pressed by their creditors, and that a sacrifice of their stock would be the result—with the advice of counsel, on the 8th of October, they sold their entire stock of goods, with all their assets, to Hunter, taking his notes therefor, at the estimated value as above stated, payable in two, three, and four years. This arrangement was not carried out, and was soon after entirely abandoned, by the advice of counsel, as objectionable. Immediately after, notice was given that the creditors of the firm would be paid either in goods at eastern cost, or in notes held by the firm. Many availed themselves of this offer, and prior to the 10th of November, the payments in that way amounted to about \$9,000. With two or three exceptions, the creditors were satisfied with this arrangement, and made no objection to it.

On the 10th of November the stock of goods had become much reduced by these payments. The firm were then indebted to Charles W. Hunter, on their note, for money borrowed of him to the amount of \$1,153, and he was liable for the firm on the notes to Anderson, on which he was indorser for \$3,935. On that day, to secure the debts due to Hunter, and to indemnify him for his liability as indorser on the notes held by Anderson, he purchased of Adair & Brothers the entire stock of goods remaining, at seventy-five cents on the dollar of the eastern cost. The

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goods so purchased amounted to \$5,681.53, and pursuant to the agreement, Hunter surrendered to Adair & Brothers the note he held on them for \$1,153, and assumed the payment of the notes held by Anderson. For the balance due from Hunter on this purchase, being \$593, he gave his note to Adair & Brothers, which has been applied in payment of a debt due by them. Hunter immediately took possession of the goods, and continued in business in the same house occupied by Adair & Brothers.

On the 21st of November, Adair & Brothers found it necessary, for the interests of those creditors whose claims had not been satisfied, to make an assignment of all their remaining property and effects, and Charles W. Hunter was named as the assignee. This assignment was for the equal benefit of all the unpaid creditors of Adair & Brothers. On the 24th of November the goods were placed in boxes and forwarded by railroad to Piqua, in the State of Ohio. They were intercepted at Dayton, in transitu to Piqua, and seized by the marshal, under the attachment issued in this suit.

The question arising on these facts is: Was there fraud in the sale of the goods to Hunter made on the 10th of November, or in the assignment by Adair & Brothers made on the 21st of November?

It is not necessary to decide whether the sale to Hunter of the 8th of October was infected with either actual or presumptive fraud.

The evidence, however, is conclusive that, though the arrangement may have been an injudicious one, no fraud was intended by the parties. The affidavit of a respectable legal gentleman proves that it was made at his suggestion and advice, as an arrangement that would be beneficial alike to Adair & Brothers and their creditors. But, right or wrong, it was abandoned by the parties, and nothing is claimed under it. And in my judgment, all the circumstances considered, there is nothing in this sale to justify an

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unfavorable presumption as to the subsequent transactions between these parties.

In reference to the sale to Hunter, made on the 10th of November, I see nothing in the facts which condemn it as fraudulent, either in fact or in law. Hunter was a *bona fide* creditor of Adair & Brothers, to the amount of \$1,153, for cash loaned to them, and was liable as indorser of their paper for \$3,935. It was no fraud in Adair & Brothers to pay the debt due to Hunter and indemnify him for his losses as indorser. A failing debtor has an undoubted right to pay any debt which he justly owes, and to secure a friend against liability, if done in good faith. And I confess I am unable to perceive any indication of unfairness or fraud in this transaction. The evidence is conclusive that the price paid by Hunter for the goods—seventy-five per cent. on their eastern cost—was their full value, and more than would have been procured for them if sold at auction or at an assignee's sale. As to the fairness and validity of the general assignment to Hunter, made on the 21st of November, there seems no reason to doubt. It was not contemplated when the sale of the 10th of that month was made to Hunter. It appears, however, that after the most earnest efforts for that purpose, the firm had been unable to make a satisfactory arrangement with all the creditors. They had settled with the most of them on terms which the creditors regarded as fair and honorable. They had offered to arrange the claim of the plaintiff on terms as favorable as they could in justice to their other unpaid creditors. The proposition had been declined, and they were threatened with an attachment. It was under the pressure of these circumstances that they made the assignment to Hunter. There is nothing in this assignment which has the taint of fraud. It was made with the advice and under the direction of counsel, having full knowledge of the parties and of the state of their business affairs, with no other purpose than to secure to the creditors of the firm an equal distribution of the proceeds

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of their remaining property and effects. It is not pretended that the assignment did not cover all the property of the firm, or that a preference was given to one or more creditors. And the proof is clear that there was no concealment or disguise in any of the transactions between the parties. Public notice was given in a widely circulating commercial daily paper of the city, two days after the date of the assignment, which negatives the idea that the transaction was intended to be secret. It is moreover in proof that Adair & Brothers freely conferred with and made known to their friends and creditors the unpleasant embarrassment of their business concerns, and the means they were taking to close their affairs. But it is insisted by the plaintiff's counsel that the assignee selected by them was an unsuitable person for the position, and that his selection raises a presumption against the fairness and honesty of the transaction. Without noticing all the facts in evidence as to the suitability of Charles W. Hunter, it may be stated that, although a young man, he had gained the confidence of those in whose employment he had been, as well as of many others who knew him for his strict integrity, and stood high in their estimation as a young man of good business capacity. Few young men could establish a better character than he has proved by a number of witnesses, the truthfulness of whose statements is beyond a doubt. He also had pecuniary means, to the amount of between \$4,000 and \$5,000; and his intimate knowledge of all the business concerns of the firm of Adair & Brothers, in connection with his good reputation, seemed to have rendered it exceedingly proper that he should be intrusted with the settlement of their business as assignee.

It is also urged as an indication of fraud in the assignment, that an effort was made to send the goods assigned to Piqua, in this State. This, it is contended, was for the purpose of concealment, and with a view to place the property beyond the jurisdiction of this court. This, however, is satisfactorily explained by the proofs before the

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court. It had been the intention of the firm, before they contemplated an assignment, to remove the goods to that place for sale. The reason for this was, that they would thereby avoid the high rent they were paying in this city, and find an equally ready and advantageous market for the goods. Hunter concurred in this view, and when the property was placed under his control as assignee, very properly decided to carry it out. There was no concealment in preparing the goods for shipment or in sending them away. The intimation that it was the design of the parties by sending them to Piqua, to place them beyond the jurisdiction of this court, is answered by the fact that they would have been as fully within reach of the process of this court at Piqua as at Cincinnati.

It may not be amiss here to make a remark in reference to the facts stated in Marshal Sifford's affidavit, to the effect that when he went to the former place of business of the firm of Adair & Brothers for the purpose of executing the attachment, one of the firm referring to the goods being removed from Cincinnati, spoke of them as the property of the firm, and not of Hunter. This, it is insisted, authorizes the conclusion that there had been no *bona fide* sale or assignment to Hunter. I do not question the truthfulness of the marshal's statement, but I can not suppose the conversation to which he testifies sustains the inference attempted to be drawn from it. It is more reasonable to conclude that Mr. Adair, in his supposed admission that the property still belonged to the firm, had reference to the fact that though placed in the hands of an assignee, the firm still had an interest in its management and disposal, and that in some sense it still belonged to them. Any other inference is so utterly in conflict with the proof before the court, that I can not hesitate to adopt that which I have indicated. It is incredible that Adair could have intended to ignore facts which are proved by the most indubitable evidence.

But I do not propose to go further in the investigation

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of the facts involved in this motion. I am satisfied the allegations of fraud are not sustained, and I may be allowed to say that, in my judgment, it is rare that the conduct of business men, in embarrassed or insolvent circumstances, is so free from exception as that of the Adairs would seem to be from the evidence before me. The evidence clearly shows that they were anxious to do all in their power to satisfy their creditors. All their movements were open and evince no intention to conceal anything from their creditors. These creditors, with one or two exceptions, were entirely satisfied with the course they have pursued; the affidavits of a number of them have been taken, and, without an exception, they state there was nothing in the proceedings of Adair & Brothers with which they were dissatisfied. And they not only testify that after years of business intercourse with the firm, they have always found them honest and honorable in their transactions, but that they still have unabated confidence in their fairness and integrity.

The motion to dismiss the attachment is sustained, and the property attached is discharged.

(DISTRICT COURT.)

**JOHN SCOTT AND JOHN A. DUBLE, OWNERS OF THE STEAM-
BOAT YORKTOWN No. 2, v. THE STEAMBOAT DICK KEYES
ET AL.**

**JOHN C. RILEY ET AL. v THE STEAMBOAT YORKTOWN No. 2
ET AL.**

A contract, made between the masters of two steamboats, providing for the exchange of certain barges, and stipulating, among other things, that the two boats "shall have the use of each other's barge until such time as they can meet and exchange barges, without injury or loss to either party," must have a reasonable interpretation. Slight loss or inconvenience would not justify either in a refusal to exchange; but each party is entitled to a reasonable time to make the necessary arrangements for an exchange.

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Where the intention of the parties is sufficiently apparent, from the terms of a written contract, and there is no ambiguity, either latent or patent, it is clearly inadmissible to give parol evidence in explanation of the agreement.

Mills & Hoadly, for libellants.

Lincoln, Smith & Warnock, for respondents.

OPINION OF THE COURT:

The libel in this case asserts a claim for \$560, against the steamboat Dick Keyes and its owners, for the hire of the barge Yorktown No. 2, belonging to the owners of the said steamboat Yorktown No. 2, and also for \$12, paid for repairs, under circumstances that will be hereafter noticed.

In the second of the above cases, the libellants allege a claim, against the said steamboat Yorktown No. 2 and its owners, for the hire of the barge Damon, the property of the libellants, from January 21st to March 10, 1855, a period of forty-seven days, at \$20 per day, amounting to \$940, and also for an incidental charge of \$40.70.

The libels in these cases were filed on the same day; and by the agreement of the proctors on both sides they have been consolidated, and are submitted as one case, to be disposed of by one decree.

It will not be necessary, in deciding the points arising in this controversy, to state specially the allegations of the libels and answers of these parties. The essential facts in evidence are, that on December 2, 1854, the said Scott and Duble were the owners, and the said Scott the master of the said steamboat Yorktown No. 2, and also the owners of a barge used in connection with said boat, called the Yorktown No. 2. At that date, the said John C. Riley was the master, and a part owner, with the other persons named in the libel, of the steamboat Dick Keyes, and two barges, called Damon and Pythias. The Yorktown No. 2 was a large boat, equipped and fitted out for the transportation of freight and passengers, and employed in navigating the Ohio and Mississippi rivers, between Cincinnati and New Orleans, using the barge

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Yorktown No. 2 as a lighter and also for the carriage of freight. The Dick Keyes was exclusively a freight boat, doing business between the places above named, and using the said two barges in tow in transferring freight.

On the said 2d of December the said steamboats were lying at Cincinnati, the Yorktown having its barge in possession, and one of the barges of the Dick Keyes being at Louisville, and the other at Paducah, in the State of Kentucky. On that day, the said John C. Riley, as master of the Dick Keyes, executed a written agreement, as follows:

“I, John C. Riley, for and in behalf of the steamboat Dick Keyes and owners, hereby obligate myself and said boat to pay to the order of the steamboat Yorktown No. 2 and owners twenty dollars per day, for the use of the barge Yorktown No. 2, commencing this day, and continuing until such time as I shall deliver to them either of the barges, Damon or Pythias, in thorough repair and ready for business. It is then understood and agreed, that said steamboat Yorktown No. 2 and said steamboat Dick Keyes shall have the use of each other's barge until such time as they can meet and exchange barges without injury or loss to either party. It is also further understood, that should the steamboat Yorktown No. 2 not wish to use the barge belonging to the steamboat Dick Keyes, that I will, for and in behalf of said steamboat Dick Keyes and owners, pay a fair remuneration for the use of the said barge, belonging to the steamboat Yorktown No. 2, until such time as I shall return it to the said boat and owners, in the same good order as received.”

In accordance with this agreement, the barge of the Yorktown was immediately delivered to the master of the Dick Keyes, and soon after the boat, with said barge in tow, started for New Orleans.

On the 29th or 30th of December, one of the barges of the Dick Keyes, the Damon, having been sent up the river for that purpose, was put into the possession of the master of the Yorktown; and that boat, having taken on board a large cargo of lard in barrels and tierces, and pork in boxes,

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and having the said barge Damon in tow, laden with 'some eighteen tons of oil-cake in bags, left Cincinnati for New Orleans the 31st of December, and arrived at the latter place the 16th or 17th of January, 1855.

The Dick Keyes was lying at New Orleans when the Yorktown arrived, having reached there some time before. Immediately after the Yorktown landed at New Orleans the master of the Dick Keyes notified the master of the Yorktown that he did not wish any longer to retain his barge, and requested an exchange of barges. This request was not acceded to, for reasons which will be noticed hereafter. And on the 19th of January, the master of the Dick Keyes, not having freight for the Yorktown's barge, sent it to Algiers, opposite to New Orleans, and placed it in possession of a person there, under an agreement to pay seventy-five cents per day for keeping it. On the same day, it appears, the Dick Keyes started for Cincinnati. This was a day or a day and a half after the Yorktown arrived.

After the Dick Keyes left New Orleans the master of the Yorktown, then expecting to get a full cargo for his boat, loaded the barge Damon, with a quantity of bulk chalk, for Cincinnati. Failing to secure such a cargo as would justify towing the barge to Cincinnati, he sent it across the river to Algiers, and left it in charge of the same person who had the keeping of the Yorktown's barge, with instructions to retain it till further orders from him.

On the 10th of March following, the Dick Keyes returned to New Orleans. The Yorktown not being there, the master of the Dick Keyes directed the chalk, which had been stored on the barge Damon, then lying at Algiers, to be transferred to the barge of the Yorktown, lying at the same place. This was done at an expense of \$40.70, which was paid by the master of the Dick Keyes, who then took possession of the Damon.

There is no controversy as to the claim made by the owners of the Yorktown for the hire of its barge from the 2d to the 31st of December. This claim of \$580 was distinctly admitted by the master of the Dick Keyes when pre-

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sented at New Orleans in January, and he requested a postponement of payment until the return of his boat to Cincinnati. It is also admitted in the libel of J. C. Riley and others, in one of the cases under consideration. The only question, therefore, before the court grows out of the claim of the owners of the Dick Keyes, for the use or hire of the barge Damon from the 21st of January to March 10, 1855. As already noticed, they claim compensation for this period, being forty-seven days, at \$20 per day, making \$940, which, adding the claim of \$40.70 for unlading the chalk, leaves a balance against the Yorktown's owners exceeding \$400. For this sum a decree in favor of the owners of the Dick Keyes is asked for.

The right of the owners of the Dick Keyes to recover anything depends mainly on the inquiry, whether under the contract which has been noticed and the facts proved, the master of the Yorktown was bound to return the barge Damon on the 19th of January, when notified by the master of the Dick Keyes, at New Orleans, that he wished the barge to be delivered to him. The circumstances under which this request was made have been partially adverted to; but it is proper here to notice that the master of the Yorktown, in taking the large quantity of oil-cake on the barge, had signed a bill of lading in which it was specially agreed that the oil-cake should remain on board for four days, if necessary, after the arrival of the boat at New Orleans. This oil-cake, it appears, was intended for market in Europe; and the shipper, wishing to avoid, if possible, the heavy expense of its removal to a warehouse and thence to a vessel for shipment abroad, had caused the proviso just noticed to be inserted in the bill of lading, expecting that within the four days named there would be a vessel in port to which the oil-cake could be directly removed without the expense of drayage, storage, etc. The evidence shows, that within the four days the oil-cake was shipped on a vessel for exportation abroad.

In reference to the written contract between the parties

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for the exchange of barges, there would seem to be no difficulty in giving it an intelligent construction without reference to any evidence by parol of facts or circumstances connected with its execution. The intention of the parties is sufficiently apparent from the terms of the written agreement; and as there is no ambiguity, either latent or patent, it is clearly inadmissible to give parol evidence in explanation or contradiction of the agreement. It is one of the provisions of the contract that the two boats "*shall have the use of each other's barge until such time as they can meet and exchange barges without injury or loss to either party.*" There is no other restriction or limitation as to the right to exchange except that which the parties have expressly stated. From the terms of the agreement, and the circumstances existing when it was made, it is obvious that neither party considered it important to fix on any time or place where the exchange should be made; and they therefore made the exchange to depend on the question whether it could be done "*without injury or loss to either party.*"

This clause must have a reasonable interpretation. The fact that some inconvenience or slight loss would result to one or both parties from an exchange would not justify either in a refusal to exchange. Each party was entitled to a reasonable time to make the necessary arrangements for an exchange. As already noticed, the Dick Keyes was at New Orleans and nearly ready to leave when the Yorktown arrived; and the request for the exchange was made immediately after the arrival of the latter boat. The Keyes remained only a day or a day and a half after the arrival of the Yorktown, and having sent the Yorktown's barge to Algiers left port for Cincinnati. This did not allow a reasonable time to the master of the Yorktown to unlade and deliver the barge. It was clearly within the contemplation of the parties, in making the agreement for the exchange of barges, that they should be used in the transportation of freight; and it is clearly implied, from the agreement, that a reasonable time should be allowed to either party to make

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the exchange. The facts show that it was impossible to deliver the barge of the Dick Keyes immediately on the request being made. It was laden with a large quantity of oil-cake, shipped by its owner under an express agreement that, if necessary, it should remain four days on board after the arrival of the boat at New Orleans. The master of the Yorktown had an undoubted right to make such an agreement, and was in no way restricted from doing so by the contract for the exchange of barges. And, if it was of importance to the master of the Dick Keyes to have the possession of the barge before starting from New Orleans he should have waited long enough to have enabled the master of the Yorktown to have complied with the request for an exchange without "injury or loss." Under the agreement for the shipment of the oil-cake a heavy loss would have been incurred by unloading it and sending to a warehouse for safe-keeping. The facts, therefore, clearly warrant the conclusion that there could not have been an immediate delivery of the barge "without loss or injury;" and, therefore, that the master of the Yorktown did not violate the agreement.

If there had been unreasonable delay in unloading the barge, the Yorktown would have incurred liability in failing to deliver it when requested; but the evidence is that the boat and the barge were unloaded as promptly as circumstances would permit. It is clear the master of the Yorktown could have no interest in postponing the delivery of the barge unnecessarily; and there is no ground for the inference that he was influenced by any improper motive in not complying with the request for the exchange. Nor can it be presumed, from the facts, that the owners of the Dick Keyes sustained any injury from the non-delivery of the barge. The barge of the Yorktown was in the possession of the master of the Dick Keyes, and if that boat needed a barge when leaving New Orleans, the master had an undoubted right to retain and use the Yorktown's barge.

But, if it were conceded that the master of the Yorktown violated the agreement for the exchange of barges, does it

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follow that the owners of the Dick Keyes are entitled to recover the charter value of their barge from the date of the request for an exchange until they obtained possession, on the 10th of March following? This they claim in their libel, asserting the charter value of the barge to be twenty dollars a day. The proof is, that the charter value of such a barge was ten, fifteen, or twenty dollars a day. This, however, must necessarily depend on circumstances existing at the time. If the state of business was such that no profitable employment for a barge could be found, it is evident the charter value would be nothing, as no one, in that state of things, would hire it. The evidence, in this case, is altogether conclusive, that from the middle of January to the middle of February, 1855, the river business at New Orleans was unusually stagnant, and that freight for Cincinnati was exceedingly scarce, and when procurable was taken at very low rates. In the opinion of several witnesses of apparent candor and intelligence, connected with shipping-houses in New Orleans, there were a number of Cincinnati boats, during the time stated, that were unable to get freight, and that at the rates then paid there was no profit in carrying it. It is, therefore, a fair inference from the facts in evidence, that the owners of the Keyes sustained no loss by the failure of the master of the Yorktown to deliver the barge when requested. This inference is strongly supported by the fact that neither of the steamboats could find cargoes for their barges, and both therefore were left at Algiers. One witness, the mate of the Keyes, states in his deposition that this boat had no difficulty in procuring a cargo at the time referred to. His statement, however, is so clearly contradicted by other witnesses as to render it wholly unreliable.

I am satisfied, therefore, there is no basis for a decree in favor of the owners of the Dick Keyes for the charter value of their barge for the forty-seven days as claimed. But, as before noticed, the master of the Yorktown, after the Keyes left New Orleans, received on board the barge a large quan-

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tity of chalk, intending to take it to Cincinnati. For the reason before stated, the barge with its cargo was left at Algiers. It would seem clear, that for the time the barge was thus used by the master of the Yorktown for the storage of the chalk, a fair compensation must be allowed to the owners of the Keyes. There is no evidence in the case proving what the rate of compensation for this storage should be; and the amount involved is too small to justify the expense of a reference to a commissioner for the purpose of ascertaining it. The proctors for the parties can probably agree on this and thus avoid a reference.

The owners of the Keyes are also allowed for the expense of transferring the chalk to the Yorktown's barge, proved to have been \$40.70. And the two items of \$3 and \$9, claimed by the owners of the Yorktown as the expense incurred by that boat in repairing the barges, are also allowed.

A decree, on the basis indicated, may be entered.

(CIRCUIT COURT.)

MERCHANT AND HUMPHREY v. JAMES LEWIS.

Under section 14 of the patent act of 1836, which provides substantially that where a verdict is rendered for an infringement of a patent right, it shall be competent for the court to render judgment for any sum not exceeding three times the amount of the verdict, as the circumstances of the case may require, with costs, the right of the plaintiff for costs follows from a verdict in his favor for any amount of damage, whether nominal or compensatory, and without any reference to the action of the court in adjudging an increase of damages.

The discretion given to the court by said section was clearly to meet the case of a willful and aggravated violation of a patent right, in which the jury had failed to do full justice to the plaintiffs.

Lee & Fisher, for plaintiffs.

Corwin & Probasco, for defendant.

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OPINION OF THE COURT:

This is an action to recover damages for an infringement of the exclusive right of the plaintiffs to the improved water-wheel, patented by Zebulon and Austin Parker. Upon the trial, the jury returned a verdict against the defendant for five dollars; and judgment has been entered on the verdict, including full costs. The defendant has filed a motion for a retaxation, on the ground that a verdict in a patent case for nominal damages does not entitle the plaintiff to costs.

The decision of the question presented on this motion depends wholly on the construction to be given to section 14 of the patent act of 1836, 5 U. S. 117, which provides in substance that where a verdict is rendered for an infringement of a patent right, it shall be competent for the court to render judgment for any sum not exceeding three times the amount of the verdict, as the circumstances of the case may require, with costs.

It is insisted by the counsel for the defendant, that under the section referred to, the plaintiffs can not recover costs, except in cases where the damages found by a jury have been trebled by the court. This would seem to be an exceedingly technical construction of the statute, not required by its phraseology, and obviously in conflict with its intention. The right of the plaintiff to costs follows from a verdict in his favor for any amount of damages, whether nominal or compensatory, and without any reference to the action of the court in adjudging an increase of damages. The discretion given to the court was clearly to meet the case of a willful and aggravated violation of a patent right, in which the jury had failed to do full justice to the plaintiff. In such a case costs are awarded; but there is nothing to negative the plaintiffs' right to recover them, if the court should refuse to exercise the discretion which the statute confers. A verdict for damages, whatever may be the amount, implies that the defendant has been a wrong-doer in the unauthorized use of the plaintiffs' exclusive right

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under his patent; and such a verdict will carry costs. It is not a just inference, in a 'patent right case, that because nominal damages are found by the jury, the action is necessarily frivolous or vexatious. It happens, not unfrequently, that the owner of a patent is compelled, for the protection of his rights, to sue for an infringement, under circumstances in which he neither seeks to recover nor asserts a right to anything beyond mere nominal damages. This may be necessary for the establishment of his patent, and to prevent infringements. And, as by the legislation of Congress, the Circuit Courts of the United States have exclusive jurisdiction in patent cases, it would be a great hardship if he were subjected to the costs in thus asserting his legal rights.

It may also be remarked, in answer to the views urged by the defendant's counsel, that if sustainable it would result that costs against a defendant could not be recovered in any patent case where the verdict was less than five hundred dollars, unless the court, in its discretion, should treble the damages found by the jury. Such a construction would most injuriously affect the rights of many meritorious patentees, and would be in opposition to the spirit and design of the patent laws.

The case referred to by counsel, 4 Wash. C. C. 106, in which it was ruled that costs were not recoverable by the plaintiff in a patent case, unless the judgment amounted to five hundred dollars, arose under the patent act of 1793. By section 5 of that act the rule of damages was three times the price for which the thing patented was usually sold or licensed; but there was no provision giving the plaintiff a right to costs. The court held that as the statute did not give costs, they could not be recovered unless the judgment was for five hundred dollars or upward. Then, by the provision of section 20 of the judiciary act of 1789, the plaintiff was entitled to full costs.

The motion for a retaxation is therefore overruled.

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(CIRCUIT COURT.)

**ROBERT J. ALEXANDER, ASSIGNEE, v. MARTIN L. TODD AND
ALFRED W. WOODS.**

A conveyance of real estate, by a debtor, is clearly fraudulent if, at the time of its execution, no consideration is paid and no security or evidence of indebtedness is taken.

Such a conveyance is also impeachable on the ground of the falsity of an admission contained in it, that the whole amount of the consideration had been paid.

The presumption of fraud, arising from the non-payment of the consideration and the failure of the vendor to take from the vendee any evidence of indebtedness for the property sold, may be rebutted, if subsequently, and in pursuance of the understanding of the parties at the time the deed was executed, the consideration is paid *in good faith*.

Proof that a full consideration for the property sold was paid, does not decisively negative the presumption of fraud, for the intention of parties, and not the fact of payment, is the test by which the transaction is to be judged.

A transfer of property, with an intent to defraud or defeat creditors, will be void, although there may be, in the strictest sense, a valuable and adequate consideration.

Where defendants are apprised, by a bill in equity, that a deed executed by them is to be impeached, it is incumbent on them to contradict and explain every fact tending to cast suspicion on it.

Possession of land, and receipt of the profits after an absolute conveyance, is evidence of fraud, unless such possession be consistent with the terms and objects of the deed, or the character of it be openly and explicitly understood.

It avails nothing that the parties to a sale insist or swear that it was made in good faith, if their declarations are outweighed by the facts and the necessary inference of law.

D. Peck, for plaintiff.

G. E. Pugh, for defendants.

OPINION OF THE COURT:

This is a bill in equity, prosecuted by the plaintiff as the assignee in bankruptcy of the defendant Woods, to set

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aside, as fraudulent and void, a conveyance of real estate by him to the defendant Todd. The allegations of the bill are substantially: that in April, 1838, the defendant, Woods, having a title in fee to a tract of nearly forty acres of land, on the Ohio river, in Belmont county, in this State, opposite the lower part of the city of Wheeling, then valued by Woods at twenty-five thousand dollars, and having no other property of any considerable value; and being at the time indebted on his own account and as a surety to the amount of nearly twenty thousand dollars, conveyed the said real estate to the said Todd, his brother-in-law, with the intent to defraud his creditors and evade the payment of his debts. The bill charges that Todd was privy to the fraud, and received the deed really as a trustee for the benefit of Woods, and that no consideration was paid by Todd, and that the possession remained virtually in Woods after the conveyance. The prayer is, that the deed may be set aside as fraudulent, and that Todd shall account for any moneys received by him for any part of said property sold; and that such part as is unsold be now sold and the proceeds paid to the plaintiff, for the benefit of the creditors of Woods.

The defendants were not required to answer under oath, but have filed answers, not sworn to, denying the fraudulent purpose alleged in the bill, and asserting that the sale and purchase of the property were in good faith, and that the consideration named in the deed was paid. As the answers are not evidence, it will not be necessary to refer specially to the facts stated in them.

The deed, which is impeached as fraudulent, is among the exhibits in the case. It bears date April 28, 1838, and appears to have been executed and acknowledged according to the requirements of law; and was left for record in the office of the recorder of Belmont county, by the grantee, on the day of its execution. It purports, in consideration of twenty-five thousand dollars, paid by Todd, to convey to him in fee the tract described, together with all the ferry rights and privileges pertaining to it. It is not signed by Mrs.

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Woods, the wife of the grantor; but it appears that, some time after its date, she released her right of dower.

The only evidence which relates directly to the execution of the deed is before the court in the deposition of the defendant Woods, who, by his own consent and the consent of the counsel for the plaintiff, has been examined as a witness. He is therefore a competent witness, and entitled to credit, so far as his testimony is not contradicted or weakened and rebutted by the probabilities of the case. He states that the sale and purchase of the real estate had been a subject of conversation between him and Todd for some time prior to the execution of the deed, but no written agreement had been signed, and the terms of the sale do not appear to have been specifically settled. He also states that he lived on the property at the date of the deed and had occupied it for many years before, and that Todd resided about a mile from it. On April 28, 1838, the parties went to the town of St. Clairsville, the county seat of Belmont county, distant about twelve miles from their homes, where they procured an attorney to write the deed, which was signed, acknowledged, and put on record as before noticed. No money was paid at that time, nor was any note or other writing given by Todd, evidencing his liability to pay the consideration named in the deed or any other sum. Woods says, in his deposition, that there was a verbal understanding that the purchase money was to be paid as he might require it in his business, except sixteen hundred dollars, the payment of which was to be deferred until it could be made from the sale of the property conveyed by the deed. He also testifies, and it is otherwise proved, that in the summer of 1838, some twenty acres of the tract was laid off in town lots and called West Wheeling, a plat of which was made and entered of record in Todd's name. No part of the money, according to the evidence of Woods, was paid to him until August 8, 1839, when he received from Todd twenty-three thousand four hundred dollars. As something will be said hereafter concerning this payment, it will not be noticed further in this place.

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Before proceeding with this investigation, the inquiry is suggested, whether from the facts connected with the execution of this deed, apart from the alleged payment at a subsequent day, such indications of fraud are found as will invalidate it. Thus considered, it is clearly a mere voluntary conveyance, and void as impairing the rights of creditors. It is too clear to admit of doubt, that Woods was not in a position to make a legal transfer of this property for any other purpose than the benefit of his creditors. His debts at that time exceeded fifteen thousand dollars, and he possessed no property of any value except the real estate conveyed to Todd. If, therefore, the evidence fails to establish the fact of a *bona fide* payment of the consideration money, the deed is void as a fraudulent conveyance to the injury of creditors.

But, without further remarks on this view of the case, I will notice some of the facts in relation to the transaction in question which justify a strong suspicion, if not the positive conclusion, that it is infected with fraud. There are circumstances in proof, relating to the conveyance in question, which are hardly accordant with an honest purpose in these parties. Without noticing all the facts inducing the suspicion of fraud, there is one, so marked in its character and so widely variant from the usage of the country in such cases, as to be significant, if not conclusive. It will be readily seen that the amount involved in this transaction, especially in reference to these parties and the time it occurred, may well be regarded as large; and, on the supposition that the sale was a real one, and free from any taint of a fraudulent intent, would have induced great caution and vigilance in its consummation. But the remarkable fact appears, that although the sale had often been a subject of conversation prior to the execution of the deed, and the terms had been, to some extent, settled between the parties, nothing had been put in writing respecting it. It is, however, still more remarkable, and wholly without explanation, that Woods executed the deed containing an acknowledgment, in the most solemn

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form, that the entire sum of twenty-five thousand dollars had been paid by Todd, when in fact no part of it had been paid, or any promise or security given that it would be paid. It seems incredible, that any man of sane intellect, intending to make a *bona fide* sale of real estate of large value, should neglect to take even the written acknowledgment of the party, in the form of a promissory note or otherwise, as evidence of the indebtedment. It is usual, in such cases, for the purchaser either to give the vendor a note with undoubted personal security, or a mortgage, to assure the payment of the purchase money. In this case, on the theory that the payment was made, nearly sixteen months elapsed from the date of the deed, during which time Woods was in possession of no evidence of Todd's liability to pay. The payment, therefore, if made, was wholly voluntary on his part, and without any pretense that interest on the amount was either demanded or paid.

In the case of *Hendricks v. Robinson et al.*, 2 Johnson's Chan. 283, the learned Chancellor Kent held that a conveyance was impeachable for fraud, where the consideration was large, on the ground that the vendor had taken the promissory notes of the vendee payable on time, without security. After stating that for the remainder of the consideration, amounting to \$221,798, notes were taken, payable in one, two, three, four, and five years, the chancellor remarks, "that the whole of this immense debt, created by the sale of the real estate at its fair value, was thus left to rest on the personal promise of H. F., without any other security, real or personal." It is true, in the case referred to, there were other indications of fraud, but great stress was laid by the chancellor on the fact above stated. He remarks, "It is contrary to the ordinary course of dealing, and repugnant to the maxims of common prudence to alienate such an immense real estate without payment or security."

The conveyance from Woods to Todd was clearly fraudulent at the time of its execution, for the reason that no consideration was paid, and no security—not even the prom-

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issory note of the purchaser—was taken. It is also impeachable on the ground of the falsity of the admission contained in it, that the whole amount of the consideration had been paid. In the case of *Watt v. Grover*, 2 Schoals & Lefroy, 501, the lord chancellor says, that “solemn instruments, duly executed, are *prima facie* conclusive on the parties. Where they state truly the transactions on which they are founded, they are binding in equity as well as at law, if the consideration stated is sufficient for the purpose. But, if it appears that transactions are not truly stated, the instruments may lose all their binding quality in equity, even if conclusive at law.”

But it is insisted, by the counsel for the defendants, that the consideration stated in the deed, though not paid or secured at the time of its execution, was paid some fifteen months after; and that, conceding the instrument to have been void at its inception, the subsequent payment purged from all taint of fraud. It is a grave question, perhaps, whether a transaction clearly fraudulent in law, at the time it took place, can be relieved from the imputation by any subsequent act. It is not proposed to consider this question in its application to this case. It is, however, proper to remark that the presumption of fraud arising from the non-payment of the consideration, and the failure of the vendor to take from the vendee any evidence of indebtedment for the property sold, may be rebutted, if subsequently, and in pursuance of the understanding of the parties at the time the deed was executed, the consideration is paid *in good faith*.

It is, therefore, a proper subject of inquiry, in this case, whether payment was made, as asserted by the defendants. But, before considering this question, it is proper to remark, that proof that a full consideration for the property sold was paid does not decisively negative the presumption of fraud. The intention of the parties, and not the fact of payment, is the test by which the transaction is to be judged. Judge Story has clearly stated the law on this subject. He says, the consideration must be valuable,

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and must also be *bona fide*; and that if there is an "intent to defraud or defeat creditors, it will be void, although there may, in the strictest sense, be a valuable, nay, an adequate consideration." And he remarks further, that "cases have repeatedly been decided, in which persons have given a full and fair price for goods, and where the possession has been actually changed; yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore set aside. Thus where a person, with knowledge of a decree against the defendant, bought the house and goods belonging to him, and gave a full price for them, the court said, that the purchase, being with the manifest view to defeat the creditor, was fraudulent, and, notwithstanding the valuable consideration, void." 1 Story's Equity, sec. 869.

But was the consideration stated in the deed paid by the defendant Todd? The evidence on this point is that contained in the depositions of the defendant Woods, his brother Andrew Woods, and Richard Miller. A proposition, it would seem, was made by the plaintiff that the defendant Todd should be examined as to the payment, but it was declined, and his statement is not before the court, except as it is contained in his answer, not verified by oath. The defendant Woods swears positively that twenty-three thousand four hundred dollars was paid to him by Todd, in August, 1839, in bank-notes, in the presence of his brother Andrew. Andrew Woods testifies that he was present, and assisted in counting the notes; and that the amount was as above stated. The witness Miller says he was in the room, and saw a large pile of bank-notes on the table, but does not know the amount.

If these witnesses are entitled to credit, the fact of the transfer of bank-notes by Todd to Woods, amounting to \$23,400, is proved. But, the question still remains, was this a *bona fide* payment of the consideration expressed in the deed? Without referring to the mass of evidence

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bearing on this point, I can only notice some of the more material facts sustaining the conclusion that this payment was not made in good faith, but was a device intended to give an appearance of fairness to the sale, when, in fact, it was the intention of the parties to place the property beyond the reach of the creditors of Woods.

1. There can be no question as to the fact that Andrew Woods was largely indebted in April, 1838, when the deed was executed. It does not change the legal aspect of the subject, that the larger part of his indebtedment was as surety for other persons. Nearly all these debts were due to banks, for which all the parties were held as principal debtors, with warrants of attorney to enter up judgments at their maturity. The defendant, therefore, was liable to judgment and to execution for these debts at the date of the execution of the deed. And, it is not controverted, that if the persons for whom he was surety were not then insolvent, they were known to be so shortly after.

2. It is a significant fact that, although the sum alleged to have been paid by Todd to Woods was large, no evidence is offered to prove from whom, or in what manner, Todd obtained it. The defendant Woods and his brother Andrew Woods say, in their depositions, they do not know where he procured this money. Nor does Todd, in his answer, give any information on this point. There is evidence that for many years prior to his removal to Ohio, in the year 1832, he had been a physician at Wheeling, and, in connection with his profession, was also interested in a drug store in that city. It is the opinion of the witnesses who have testified as to this point that his business was lucrative; and it appears that he was the owner of real estate in Wheeling of considerable value. But, as negating the fact of his having in his possession nearly twenty-four thousand dollars in August, 1839, it is in evidence that he disposed of no real estate about that time, and that he had no deposits, to any considerable amount, in any of the banks at Wheeling, or that vicinity. And there

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is also evidence, in regard to some of his pecuniary transactions, showing that his cash means were quite limited.

Now, as upon the theory on which the defendants attempt to sustain the deed in question, it was obviously important to prove, not only the payment of the consideration, but that the purchase by Todd was free from all imputation of fraud, or covinous purpose, their failure to adduce any proof as to the source whence the large sum in question was obtained, may well excite suspicion as to the character of this transaction. And this suspicion is certainly in no degree weakened by the omission of the defendant Todd to state the facts, which were within his knowledge, relating to this point. The defendants were apprised by the bill that the deed was to be impeached; and it was incumbent on them to contradict or explain every fact tending to cast suspicion on it.

3. In addition to the facts that no note or other writing was given when the deed was executed, as evidence that the consideration money was due, and that for more than fifteen months the business remained in this uncertain and perilous position, the still more extraordinary fact is developed that when the money was paid no receipt or other written evidence of payment was required by Todd, or given by Woods. In a transaction of so much importance to these parties, it is almost incredible that they should be content to leave it resting in the knowledge or memory of a single witness.

4. In the next place, the conclusion is irresistible from the evidence before the court, that no satisfactory account is given of the application of the money alleged to have been paid by Todd to Woods. After a rigid examination, the statements of Woods in his depositions are, in some particulars, vague and unsatisfactory, and as to others, in direct conflict with the reliable evidence of other witnesses. I do not propose to notice the evidence at length on these points. It is remarkable, however, that Woods produces no book or voucher showing the payment of a dollar of

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the funds received from Todd in extinguishment of his debts. He states that he paid to different persons, to whom he was indebted, some thirteen thousand dollars, and that he lost largely by investments in steamboats. The accuracy of these statements is seriously impugned by the evidence of other witnesses, proving that at least two debts of considerable amounts were paid prior to August 8, 1889, and could not, therefore, have been paid out of the funds received from Todd.

5. There is still another view of this transaction, which, in my judgment, exhibits its real character in a light that clears it of all doubt, and forces on the mind the conclusion that it is infected with legal, if not actual fraud. I refer to the fact established by the proofs that there was no real change of possession after the alleged sale to Todd. Chancellor Kent, in the case of *Hildreth v. Sands*, before referred to, says that "possession of land, and taking the profits after an absolute conveyance, is evidence of fraud within the statute of frauds, unless such possession is consistent with the terms and object of the deed, or the character of it be openly and explicitly understood." 2 Johns. Chan. 46. There is no pretense that the deed to Todd contains any reservation of the right of possession in Woods. Nor is there any evidence conducing to prove, in any legal sense, that Woods was the agent of Todd, and retained the possession and exercised acts of ownership in that character. Several of the persons who purchased lots after the town was laid out state that they were not aware of any conveyance to Todd, and supposed the title was in Woods until they received their deeds from Todd. It is true, that in some instances Woods professed to act as Todd's agent in the sale of lots, and after receiving payment procured the deeds to be made in his name. Woods received in cash and otherwise more than four thousand dollars for lots thus sold, and there is no evidence that he ever paid this sum, or in any way accounted for it to Todd. In one case it appears that as late as the year 1842, subsequent

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to the discharge of Woods under the bankrupt law, he received pay in part for a lot sold in work on a ferry-boat. And it is also proved that he offered to pay a debt due from him by the sale of a lot in the town, and with this view procured Todd to execute a deed to his creditor.

There is one fact bearing on the question of Woods' possession after his conveyance to Todd that seems to be conclusive. It has been already noticed that some months after the date of this conveyance, some twenty acres of the land described in it were laid off in town lots, leaving about seventeen acres not included in the town plat. This part of the tract was mostly a hill-side, in which there was a valuable coal-bank that had been worked for many years before the conveyance to Todd. On this seventeen-acre tract was situated a dwelling house, in which Woods had long resided, and where, without any change and without any lease from Todd, he continued to reside, and perhaps yet resides. It also appears that the ferry, which was an appendage of the property, has been ever since carried on by Woods, the license therefor always being in his name. It is also in proof that he has continued to take coal from the coal-bank for the use of his ferry-boat, and that he has also sold large quantities of coal taken from that bank.

It is true the defendant Woods says in his deposition that he agreed to pay Todd three hundred dollars a year for the ferry and for the coal required for the use of the ferry-boat; and was also to account at a price agreed on for the coal sold by him. No written agreement to this effect is exhibited; nor is there any evidence of any agreement by parol or otherwise, except what is contained in the deposition of Woods. It is obvious from the position he occupies in reference to this case, that his testimony must be received with great caution. He testifies under the influence of a strong desire to sustain the fairness of this transaction, and thus vindicate his character from the imputation of fraud. In reference to facts of such materialty

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as those now under consideration, it is most reasonable to require that his testimony should in some way receive confirmation. If he was *bona fide* the tenant of Todd, and in that character retained the possession and use of the dwelling house, the ferry, and the coal-bank, it may be well asked why some proof of the fact beyond his own statement is not adduced? It is strange, indeed, that this arrangement should be allowed to continue for many years without some note or memorandum in writing of its existence. There is not only the absence of such proof, but the statements of Woods as to his being *bona fide* the tenant of Todd, are strongly impeached by facts drawn from him in the progress of his examination. Although he states that he settled with Todd for the rent of the ferry and the use of the coal-bank, he admits that he kept no account in any form of their dealings, and does not exhibit any book or voucher showing the payment of anything to Todd on account of rent. He also states that he does not know that Todd kept any book showing the state of their accounts. It would certainly require a great stretch of credulity to believe that if the relation of landlord and tenant existed between these parties in good faith, there would be such looseness and carelessness in the transaction of their business. And I can not resist the conclusion that in reference to the dwelling house, the ferry, and the coal-bank, the possession remained unchanged in Woods after the conveyance to Todd; and that he enjoyed all the benefits and advantages of that part of the tract not included in the town plat, on which was situated the dwelling house with its appendages, as also the coal-bank, as fully as before the alleged sale to Todd. This remark would seem also to apply to the ferry and the privileges connected with it.

It is also worthy of notice, as an indication of the real character of this transaction, that while it is alleged in the answers of both the defendants that it was verbally agreed that Woods should act as the agent of Todd in the sale of lots, and while Woods states in his deposition that such

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was the agreement, and that he sold lots and received payment as an agent, there is no satisfactory evidence that any accounts were kept between them showing the existence of the relation of principal and agent. Woods states distinctly that he kept no account of sales made or moneys received, and that he does not know that Todd had any books or papers showing these facts. The omission to do this, and the vague and unsatisfactory statements as to the settlements between these parties, involving large amounts of money, are certainly indications of the real character of the conveyance to Todd. Men of ordinary intelligence and prudence do not conduct their business in this loose manner. The instincts of self-interest usually induce all men, in their business transactions, to make full and exact entries of moneys received or paid. And the mind is forced to the conclusion, in the absence of any proof that this was done, as between a principal and agent, that the parties did not recognize the existence of the relation. In this case, there is no book, voucher, or paper of any kind showing any receipts of moneys by Woods as the agent of Todd, or any payments to the latter in that capacity. This is not accounted for by the lapse of time since these alleged transactions took place. The deposition of Woods was taken within less than ten years from the date of their occurrence; and it is not reasonable to suppose that within that period the written evidence of what passed between the parties could have been lost or destroyed. There is no pretense in this case of such loss or destruction.

Without further remarks or comments, I am obliged to say, that looking to the conduct of these parties from the first to the last of their transactions, it seems irreconcilable with the supposition that the transfer of the property in question was made in good faith. I can not doubt that it was a mere device to put the property of Woods beyond the reach of his creditors; and viewed in this light, it has the infection of legal fraud. That both the parties are

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implicated in it seems hardly to admit of doubt. It is indeed insisted that there is no proof that the defendant Todd had any knowledge of the embarrassment of Woods at the time of the execution of the deed. There is no such direct evidence; but can it be doubted, considering that the parties were brothers-in-law, living near to each other, and were on terms of intimacy and friendship, that he had such knowledge? Todd was then an aged man and in infirm health; and it is altogether improbable that he would have purchased this property under such circumstances at a price greatly beyond its real value, with the purpose of laying off a town and making profit by the sale of town lots. While it is quite conceivable that he may have been influenced by a benevolent desire to shield his brother-in-law from impending pecuniary ruin, and for this object was willing to place himself in the position of a purchaser of the property, yet, in a legal aspect, he was a mere trustee for the creditors of Woods. And it avails nothing that these parties insist or swear that the sale was in good faith. In the case of *Hendrickson v. Robinson*, before cited, Chancellor Kent remarks: "It is indeed true, that the purchaser and the vendors say that this was an honest and *bona fide* sale, but do not the facts, which they all admit, outweigh the declaration? And can a mere assertion be compared to the unequivocal language of facts and the necessary inference of law?"

It results from these views that a decree must be entered for the plaintiff. It must declare the conveyance from Woods to Todd fraudulent and void; but as it is admitted by the plaintiff's counsel that those who have purchased lots in the town are purchasers for a valuable consideration and without notice of any fraud in the sale to Todd, their rights are not to be affected by the decree. The decree must also direct that the unsold portion of the tract be sold for the benefit of the creditors of Woods. And so far as Todd has received moneys for the sale of lots or the rent of the dwelling house, coal-bank, and ferry, he must be

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held to account for the same. This will involve the necessity of a reference to a master, who will be authorized to examine the defendant Todd on oath and report to this court.

(DISTRICT COURT.)

STAPP ET AL. v. STEAMBOAT SWALLOW.

A person having a valid maritime lien on a steamboat, who proceeds to enforce it in a State court, and obtains judgment therefor, thereby waives his original lien, and occupies a footing of equality with other creditors having no maritime lien, who also proceeded under the State law.

In the construction of a State law, this court is bound to adopt the views of the Supreme Court of the State.

Claims not founded on maritime liens have no standing in this court in the exercise of its admiralty jurisdiction, and will be dismissed.

Lincoln, Smith & Warnock, for libellants.

Dodd & Huston and *Collins & Herron*, for intervenors.

OPINION OF THE COURT:

The original libel in this case was filed in the joint names of different persons, severally claiming for labor and services rendered the steamboat Swallow in various capacities. Others have intervened for wages due. There are also claims for supplies furnished and repairs to the boat. It is conceded that these are all claims importing maritime liens. By consent, a decree has been entered for the sale of the boat, and the application of the proceeds to the satisfaction of these liens. A sale has been made and the proceeds applied; and there is now a surplus in the registry applicable to a class of claimants having no maritime liens. The only question before the court relates to the distribution of the funds in the registry to these claimants. The aggregate amount of this class of claims exceeds the sum in the registry; and hence the duty of the court to decide how it shall be apportioned.

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Among those now asserting claims to the surplus are some who had originally valid maritime liens for supplies and repairs. Instead of enforcing their claims in this court, and insisting on their privilege of lien, they proceeded in a State court, under the water-craft law of Ohio, and have obtained judgments, which are now filed as the evidence of their claims in this court. It is insisted in the argument that these claims still retain their original character as maritime liens, and have priority over those not importing such lien, in which seizures have been made under State process.

In the case of *Dudley v. Steamboat Superior*, decided in this court some years since, and reported in 1 Newberry's Ad. 176, this question was presented, though not argued; and the court held, that a claimant having an original maritime lien who, instead of asserting and enforcing his claim in the admiralty court, proceeded under the State water-craft law, thereby waived such lien, and occupied in this court a position of equality with those claiming liens solely by virtue of seizures under the State statute. I have no reason to doubt the correctness of the views indicated in the case referred to. It is true I have found no reported case in which this question has been under consideration in any other court. It is, however, clearly consonant with reason and the analogies of law, that if a party, having an undisputed maritime lien, voluntarily waives it by seeking another remedy, he can not be reinstated in his original right. His claim against the boat has passed into a judgment, pursuant to the State statute, and before a State magistrate or court, thereby losing wholly its original character as a maritime claim. It results, from this view, that this class of claimants can have no preference or priorities, except such as belong in common to all those who have made seizures under the water-craft law.

It is a question in this case, whether there is any priority of privilege among those claimants who have caused seizures to be made, under the statute referred to, dependent on the date of the seizure. On the one hand, it is insisted

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in argument that no preference is gained by a priority of time in the seizure, and that all creditors, having a lien by seizure, are entitled to a *pro rata* distribution of the proceeds. On the other hand, it is contended that priority of seizure imports a priority of lien; and that distribution must be made to the creditors of the boat in the precise order of the date of the seizures. It is conceded that the Ohio courts, including the Supreme Court, have uniformly recognized the rule just stated, in the construction and enforcement of the water-craft law. They hold that seizures made on the same day have an equality of lien, and those made on subsequent days are subordinate to those made at a prior date. It is true this construction is not in conformity with the principles which usually prevail in admiralty in adjusting the priorities of maritime liens. But its application to proceedings under the water-craft law seems to be a necessary result of the principle settled by the State courts, and recognized by this court, that the statute gives no lien until there is an actual seizure of the debtor boat or craft. If the seizure alone creates the lien, it follows that the priorities of the creditors of the boat or craft must be determined, with reference to the date of seizure, subject to the modification before stated, that all seizures made on the same day are to be regarded as importing an equality of lien. If I doubted the justness and expediency of this principle of construction, I should regard it as my duty to give it my sanction, for the reason that it has been uniformly adopted by the courts of the State, in carrying out the statute referred to. It has settled a rule of property, depending on the construction of a State law; and, in accordance with the numerous decisions of the Supreme Court of the United States, is obligatory on the judges and tribunals of the Union.

There is another question in this case, as to the effect of the attachment prosecuted in the Superior Court of Cincinnati by James Millinger against Albert Culbertson, the owner of an interest of one-fourth in the steamboat Swal-

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low. The attachment was served on December 5, 1857, and prior to any seizures under the water-craft statute. The nature of the debt claimed by the plaintiff in the attachment does not appear, but the commissioner reports that a judgment was obtained against the defendant in attachment for \$6,897. No sale was made under the judgment, and, being still unsatisfied, it is now set up in this court as a valid claim against the steamboat.

It is not controverted in argument, and I suppose there is no room to doubt, that the seizure by attachment of the interest of one-fourth in the boat, held by the defendant Culbertson, operated as an effected lien to the extent of that interest. I understand, that by the practice and decisions of the State courts, the seizure of a boat or other water-craft, by the process of attachment under the statute of Ohio, has the same effect as a seizure under the water-craft law; and when made on the same day, is held to have an equality of lien. If this proposition is maintainable—and I perceive no reason for doubting it—it follows that as the seizure, under the attachment by Millinger, was prior in date to any of the seizures under the water-craft law, he has priority of lien to the extent of the interest of Culbertson.

It is insisted, however, that granting such to have been the effect of the service of the attachment, the lien created was waived or relinquished by the plaintiff, and can not be set up by him. The facts relied on, in support of this position, as reported by the commissioner, are, that after the service of the attachment, an arrangement was made by the parties by which the boat was permitted to remain in the possession of the master, and to engage in its regular business, upon bond being given conditioned for the delivery of the boat, or the payment of the appraised value of the interest attached, to answer the judgment that might be obtained in favor of the plaintiff. Such a bond was given and accepted by the plaintiff; and the boat continued in the possession of the master, and was employed in its ordinary

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business until the 6th of February following the date of the service of the attachment, on which day it was delivered to the sheriff of Hamilton county to answer the claim of the plaintiff Millinger. This was before there was any seizure of the boat, either by process under the water-craft law or from this court. It also appears, though the fact is perhaps not material in the consideration of the point before the court, that nearly the whole of the indebtedness of the boat originated between the date of the service of the attachment and the delivery of the boat to the sheriff.

Do these facts warrant the legal conclusion that the plaintiff in the attachment waived or relinquished his rights accruing from the seizure of the boat, and that he can not now assert a priority of lien over those who subsequently proceeded under the water-craft law? I regret that this point was not more fully discussed in the argument. No authorities were referred to applicable to it; nor have I found any which throw any light on the question. My conviction is, however, strong that there is nothing in the facts stated, which can be viewed as equivalent to a waiver of the plaintiff's rights under the attachment. When the arrangement was made by which the master was allowed to run the boat, no proceedings had been instituted against it except the attachment by Millinger; nor could he be presumed to know there were other parties whose interests could be affected by the arrangement. In any view, it could not operate prejudicially to the interests of other creditors. On the contrary, as affording the means of earning something for the owners, it would increase their ability to pay the liabilities of the boat, and thus inure to the benefit of the creditors. In a word, it is impossible to conceive of any principle, in the facts referred to, impairing the lien of the plaintiff in attachment or any just ground of complaint by the other creditors.

The claim of Millinger, to the extent of Culbertson's interest of one-fourth, must be respected, and entitles him to a preference in the distribution of the fund in the reg-

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istry over those whose seizures were subsequent, and for causes of action not implying a paramount admiralty lien.

If, however, it can be made to appear that the judgment obtained by the plaintiff in attachment was not for a *bona fide* debt, or if, on any satisfactory showing, the court can be satisfied there was fraud or unfairness in the judgment or other proceedings in attachment, it would perhaps be competent to modify the final order of distribution. As the facts now appear to the court, the plaintiff in attachment, in a legal proceeding, obtained a judgment, which must be held to be valid until it shall be made clear that such is not its legal effect.

There is a class of libellants asserting claims not founded on maritime laws or on seizures under the State law, who clearly have no standing in this court in the exercise of its admiralty jurisdiction, and as to whom the libels will be dismissed at their costs.

(CIRCUIT COURT.)

MARTIN BELL v. ADDISON McCULLOUGH, JAMES LAMPTON,
WILLIAM H. LAMPTON, ET AL.

If a party obtains a license from a patentee to use his invention, but neglects to pay the price for a long time, and finally, when prosecuted, abandons his license, or while relying upon it, defends also upon other grounds, the license will be forfeited, and he will be liable as an infringer.

A paper purporting to be an assignment of an expired patent is void as an assignment, though it may be enforced as a power of attorney.

The object of the provision, which permits the court to treble the verdict found by the jury, is to remunerate patentees who are compelled to sustain their patents against wanton and persevering infringers, and was not intended to include mere collection suits brought upon an expired patent.

THIS was an action on the case, tried by the court and a jury. The suit was brought to recover damages for

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the infringement of the patent of Martin Bell, more particularly referred to in the report of the case of *Bell v. Daniels*, 1 Fisher, 872. The defendants insisted that the plaintiff could not recover :

1. Because the defendants did not infringe the plaintiff's patent.

2. Because some ten years before the expiration of plaintiff's patent, one Foster, an agent of the patentee, had put up the apparatus for the defendants, for an agreed price, which was to include the license fee, but which fee the defendants had neglected to pay.

3. Because, since the expiration of the patent, the patentee had assigned the same to Christian Shunk, for whose benefit the present suit was brought.

G. M. Lee and S. S. Fisher, for plaintiff.

Isaac C. Collins and John W. Herron, for defendants.

CHARGE OF THE COURT :

1. As to the alleged verbal license from Foster, the agent of Bell, to the defendants, the court will remark, that the contract of license is like every other contract, and depends upon a fair construction of the acts of the parties, of which acts the jury are to judge; but, if even a party originally obtains a license from a patentee to use his invention, but neglects to pay his license price for a long time, and finally, when prosecuted, abandons his license, or, while relying upon it, defends also upon other grounds, the license will be forfeited, and he will be liable as an infringer.

2. As to the paper produced in evidence and claimed to be an assignment to Christian Shunk, executed and delivered by Bell after the expiration of his patent, the court instructs you that the patent, after it expired, was a mere "chose in action," and all that the patentee sought to convey was his right to collect, by suit, or otherwise, the damages which had accrued during the lifetime of the patent.

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Such a right was not assignable, and the paper offered in evidence, so far as it purports to be an assignment, is void, although it may be good as a power of attorney authorizing the assignee to collect for infringements.

The jury found a verdict for plaintiff with \$200 damages.

The plaintiff's counsel subsequently moved the court to treble the damages under the provisions of section 14 of the act of July 4, 1836.

THE COURT:

The provision contained in section 14 of the act of 1836, under which this motion is made, is as follows: "That whenever, in any action for damages for making, using, or selling the thing whereof the exclusive right is secured by any patent heretofore granted, a verdict shall be rendered for the plaintiff in such action, it will be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs," etc.

The object of this provision was to remunerate patentees who were compelled to sustain their patents against wanton and persevering infringers. There may be, and doubtless are, cases in which the discretion vested in the court for this purpose should be exercised, but it would hardly seem that the spirit of the act was intended to include suits brought upon an expired patent, which are merely cases of collection, the sole object being the recovery of damages.

The motion is therefore overruled.

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(CIRCUIT COURT.)

EX PARTE TRUMAN C. EVERTS. HABEAS CORPUS.

The first clause of section 14 of the judiciary act of 1789, which provides that the Supreme, Circuit, and District Courts of the United States, "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," does not authorize said courts to issue a *habeas corpus*, unless it is necessary in aid of jurisdiction, in a case or proceeding there pending.

The case of a father claiming the custody of an infant child, is not one in which a *habeas corpus* can issue, by a court of the United States, as ancillary to the exercise of its jurisdiction, under the above-cited clause of the act of 1789.

Nor can a Circuit Court of the United States take jurisdiction under section 11 of the act of 1789, although the father is a citizen of another State, as the matter in dispute has no pecuniary value, and can not be estimated in money.

M. H. Tilden, for relator.

Johnson & Carroll, and *Mr. Howard*, for respondents.

OPINION OF THE COURT:

Truman C. Everts, the relator, has filed his petition in this court, for a writ of *habeas corpus*, averring that he is a citizen of Kentucky, and that in 1849 he was married at Dayton, Ohio, to Eloise H. Morrison, and that in September, 1850, a daughter was born to the parties, named Bessie; that in September, 1856, by reason of the improper conduct of the wife, a separation took place between the parties at Toledo, Ohio, about which time the wife admitted that she had been guilty of adultery; that the said Everts then took charge of the daughter, and removed to the city of New York, where the child was placed in the keeping of his relatives, who, from their wealth and respectability,

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were fitted to take charge of her nurture and education; that she was placed at school, and was in all things well cared for, happy, and making rapid progress in her education; that in June, 1858, upon the petition of his wife, a proceeding of which he had no notice, and upon allegations which were altogether false, the Court of Common Pleas of Montgomery county, Ohio, rendered a decree annulling the marriage contract between the parties; that while the said Everts was absent in Kentucky, his wife and other persons clandestinely, forcibly, and against the will of the child, abducted her from the school at which she had been placed, and the custody of those having charge of her, and removed her to Dayton, where she is forcibly and unlawfully detained by Mrs. Everts, Lenox Compton, and Fielding Lowry. The prayer of the petition is, that a writ of *habeas corpus* issue, requiring the said parties forthwith to produce the said child, with the cause of her detention; and that on the final hearing, she may be restored to the care and custody of the petitioner.

A writ of *habeas corpus* issued from this court, according to the prayer of the petition, which has been served on the parties; and they have appeared and filed their answers. Lowry states, in his answer, that the child is not, and has not been, since the filing of the petition, in his custody or under his control. Compton answers, in substance, that he is the stepfather of Mrs. Everts, who brought the child to his residence, near Dayton, in June last, where she has since remained with her mother; and that he is willing, and has the pecuniary ability to take care of and provide for her till she is of age. He does not claim the right to detain the child, and alleges that she there is, and has been, under the exclusive control and authority of her mother.

Mrs. Everts answers, denying all the allegations of fault or impropriety of conduct on her part, as set out in the petition. She admits the custody of the child, and claims the legal right to retain her in charge, as her mother; and also on the ground of the decree of the Court of Common

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Pleas of Montgomery county, dissolving the marriage contract between her and her husband, and giving to her the custody of the child. She exhibits the record of the proceedings in her application for divorce, from which it appears that Everts being, as averred, a resident of the city of New York, a summons and copy of the petition was addressed by mail to him at New York, and publication made of the filing of the petition in a newspaper printed at Dayton, in accordance with the statute of Ohio. She also avers that the facts set forth in her petition as the grounds of the decree are true, and were substantiated by sufficient and credible testimony, and that there was no fraud or illegality in the proceedings resulting in such decree.

Upon the facts thus presented, the court must first consider the grave question of its jurisdiction to take cognizance of this case, and make the order prayed for by the relator, even conceding the case made by him in the petition to be sustained by the evidence. It is strenuously insisted by counsel that this jurisdiction does not exist, and that, therefore, it is the plain duty of the court to dismiss the petition. It is, perhaps, to be regretted that this question was not made upon the application for the writ, and before the parties had incurred the expense of taking the great mass of evidence on file. But it is not too late now, as the want of jurisdiction is not waived by the appearance of the parties, and the presentation of a defense on other grounds.

The question indicated has been argued at great length, and with much ability. In support of the jurisdiction of the court, probably every authority bearing on the question has been adduced, and the cases and principles referred to have been amplified and enforced with great ingenuity and learning. And I enter upon its consideration with a proper sense of its importance, and of the responsibility assumed in its decision. I may add, that I deeply regret the unavoidable absence of the circuit judge at the hearing in this case, which has deprived the parties of the benefit of his

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great learning and mature judicial experience in the determination of this question.

In the outset, I may remark that it is distinctly conceded by the counsel for the relator that the court must find its warrant for the jurisdiction claimed in the constitution and laws of the United States. No principle can be more definitively settled than that the courts of the Union, from the highest to the lowest, are courts of limited jurisdiction, in the sense that they can call into action no powers not expressly conferred by law, or incidental to those granted. Thus, in *ex parte Bollman and Swartout*, 4 Curtis, 23; 4 Cranch, 75, Chief Justice Marshall says: "Courts which originate in the common law, possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, can not transcend that jurisdiction." This principle, thus established at an early day by the Supreme Court, applicable to the jurisdiction of the courts of the United States, has, in numerous cases, received the sanction of that court.

The question now under consideration must, therefore, be decided with reference to the legislation of Congress, defining the jurisdiction of the federal courts in cases of habeas corpus.

The claim for the exercise of jurisdiction in this case is based mainly on section 14 of the judiciary act of 1789, 1 Stat. U. S. 81. This section provides "that all the before-mentioned courts of the United States (the Supreme Court and the Circuit and District Courts) shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause

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of commitment: provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The question arising on the clause of the foregoing section, granting the power to the courts of the United States to issue the writ of habeas corpus, is, whether the limitation expressed in the words, "all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions," is applicable to the writs of scire facias and habeas corpus, previously named. The learned counsel for the relator insists that the power to grant the two writs specifically named, is distinct and independent, and not affected or controverted by the limitation to "other writs" necessary to the exercise of the jurisdiction of the courts. On the other hand, it is claimed, in an argument of great force, that the words of limitation referred to, apply as well to the writs designated as to all other writs; and that the writs authorized under that clause are such only as are necessary to the just exercise of the jurisdiction of the courts. If this construction of the statute is sustainable, it is clear this court has no authority to act in the case made in this petition, and must necessarily order its dismissal.

It is not a matter that should excite surprise, that no case is found in the reports of the Supreme Court of the United States, in which an authoritative construction has been given to the clause of the statute under consideration. The Supreme Court, as decided in *Barry's case*, 2 Howard, 65, has no *original* jurisdiction under that clause to issue the writ of habeas corpus. While, therefore, there have been numerous applications to that court for the writ of habeas corpus, they have been based on the latter clause of the section, and have involved only the exercise of the revisory power of the court, in passing on the legality and validity

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of commitments and imprisonments under the orders or process of inferior courts.

In the case of *ex parte Bollman et al.*, before referred to, this question was not involved; but Chief Justice Marshall, in giving the opinion of the court, refers to it, though he does not expressly decide it. He remarks, that "the only doubt of which this section (14) can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of habeas corpus as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some causes which they are capable of deciding. It has been urged that in strict grammatical construction, these words refer to the last antecedent, which is "all other writs not specially provided for by statute." And he adds, "this criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt is, that the true sense is to be determined by the nature of the provision and by the context."

This is a clear intimation, that as a question of mere grammatical construction it is not free of doubt, and availing myself of the hint given by the chief justice, I have endeavored to attain a conclusion as to the sense of the clause from its nature, and its connection with other parts of the section.

And, in the first place, it is worthy of remark that the power to award the writs of scire facias and habeas corpus, in the first part of the section, is "to all the before-named courts of the United States," meaning the Supreme, Circuit, and District Courts. It is to be noticed that all the courts are placed on a footing of equality as to their power to grant the writs named or referred to. Now, it is most obvious that the grant of this power to the Supreme Court is not within the cases enumerated in the constitution of the United States, in which that court can exercise original jurisdiction. That court, in the case *ex parte Barry*, 2 Howard, 65, expressly decided that it had no original jurisdiction to issue

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the writ of habeas corpus, in the case of a child alleged by the father to be illegally detained in the custody and possession of the mother. There is no room for a doubt as to the correctness of this decision. That court long since decided that Congress could not confer upon it original jurisdiction in any case not within the specifications in the constitution.

On the ground taken by the counsel for the relator, the clause of the statute under consideration authorizes all the courts named to grant the writ of habeas corpus in any case where personal restraint or imprisonment of the person is alleged, without restriction or limitation. Our present inquiry is, whether it was within the intention of the act of Congress of 1789 to clothe those courts with such a jurisdiction. And it seems to the court, in taking the affirmative of this inquiry, we charge on that Congress the folly of attempting to confer original jurisdiction on the Supreme Court, in palpable conflict with the constitution of the United States. I do not suppose that such a suspicion can attach to the distinguished statesmen who composed that Congress. It was the first Congress convened after the adoption of the constitution of the United States, and not a few of its most influential members had been prominent in the convention that framed that instrument. Of these men it may be well said, that for sagacity, statesmanship, and profound learning they have had no superiors in any after period of our history, and we should be slow in admitting that they could have sanctioned an intended violation of the constitution. At all events such a conclusion should rest on a firmer basis than a doubtful question of grammatical construction.

But there is no occasion for any inference in the least discreditable to the intelligence or purity of the Congress of 1789. No violence was intended, and in my judgment none is committed on the constitution by the clause of the statute under consideration. Its language fairly imports a power in the courts of the United States to grant the writ of habeas corpus and all other writs proper and necessary in the just

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exercise of their jurisdiction. And I can see nothing in the grammatical construction of the clause that calls for any other sense than I have indicated. There was an apparent propriety in designating the important writs of scire facias and habeas corpus; and then, to avoid prolixity and the useless specification of all the other writs and processes necessary to the salutary exercise of the jurisdiction of the courts, to adopt the comprehensive form of expression, "all other writs." These latter words, by every rule of grammatical construction, are connected with and refer to the *writs* of scire facias and habeas corpus before named.

There is another consideration in the construction of the statute which is entitled to great weight. As already noticed in the first clause of the section, the power to grant the writ of habeas corpus is to the *courts* and not to a *single judge*; while in that clause of the section authorizing the writ "for the purpose of an inquiry into the cause of commitment," any *judge* of any of the courts is empowered to award it. There is a plain and obvious reason for this distinction. If the power to grant a habeas corpus is given in the first clause of the section only where necessary to the exercise of the jurisdiction of a court, there is great propriety, if not necessity, that the writ should be ordered by the *court* and not by a single judge. The clause, beyond question, contemplates the grant of the writ for the enforcement of jurisdiction in some proceeding or case pending in the court in which the writ is prayed for. And that court alone, in its capacity as a court, and not a single judge, is best qualified to decide, judicially, whether the writ is necessary to enforce its jurisdiction. On the other hand, when the great prerogative writ—the writ of liberty—the writ of habeas corpus *ad subjiciendum*—authorizing an inquiry into the cause of commitment, provided for in the second clause of the statute is referred to, *any* judge of *any* of the courts is empowered to grant it. The reason of this is, that when a case of unlawful imprisonment, under color of

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legal process or authority exists, there is a necessity for prompt and speedy action; and hence the party is entitled to be heard before a single judge, without waiting a regular session of a court, which might be months distant, and at a point remote from the place of the imprisonment of the party applying for deliverance. That this was the writ contemplated by the authors of the constitution in the clause which prohibits its suspension except in certain emergencies, is quite obvious. They could have no reference to the writ as used to relieve from either actual or constructive restraints or imprisonments of the person resulting from the relations of master and servant, guardian and ward, parent and child, or husband and wife. It was doubtless intended to protect against those invasions of personal liberty which are perpetrated under color of legal or official authority. The framers of the constitution had in view those outrages and usurpations which characterized the worst periods in the history of the British nation, by which the personal liberty of the citizen was invaded, from political considerations, but with the forms of legal authority. As a remedy for such abuses of power, and disregard of legal and constitutional rights, the judges of the courts of the United States are invested with the authority to issue the writ of habeas corpus and inquire into the cause of commitment.

And, under the clause referred to, there is no limitation to the power of the judges except that contained in the proviso which prohibits them from granting a habeas corpus where the imprisonment is by State process or under State authority. As before intimated, the numerous authorities cited by counsel refer to cases where the writ has issued under the clause here referred to; and these cases need not therefore be specially noticed, as they have no application to the question under consideration.

It is claimed, however, that there are other cases which sustain the jurisdiction now asserted for this court. The case of *United States v. Green*, 3 Mason, 482, has been cited in support of the position assumed by the counsel for the

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relator. It was a case of habeas corpus, presenting a question as to the rightful custody of an infant daughter, alleged to be wrongfully detained by the grandfather of the child. It is true the writ in that case was allowed by Judge Story, in the Circuit Court; but it does not appear, that either on the petition for the writ, or upon its return, the question of jurisdiction was presented. And, before any final action by the court, the parties entered into an amicable arrangement, as to the custody of the child, which received the sanction of the court. This can not be claimed as an authoritative decision, on the point now before this court.

It is also insisted that the case *ex parte Barry*, before referred to, is in support of the jurisdiction of this court. The only point decided in that case was, that the Supreme Court of the United States had no original jurisdiction to issue the writ of habeas corpus prayed for, and therefore dismissed the proceeding. In the opinion by Judge Story, the court say: "Without, therefore, entering into the merits of the present application, we are compelled by our duty to dismiss the petition, leaving the petitioner to seek redress in such other tribunal of the United States as may be entitled to grant it." This is but an intimation that the lower courts might have jurisdiction, but the question did not arise in the case, and can not be claimed as a decision by the Supreme Court.

The case of the *United States, on the relation of Wheeler, v. Passmore Williamson*, 4 Am. Law Reg. 5, is also relied on as an authority by the counsel for the relator. This case was decided by the late Judge Kane, of the District Court of the United States for the Eastern District of Pennsylvania. The circumstances under which the writ issued were briefly as follows: Wheeler, the relator, was the owner of three slaves, who, as he alleged in his petition, were forcibly taken from his possession at Philadelphia by Williamson, and by him were unlawfully detained in custody. The prayer of the petition was, that Williamson might be required to produce the slaves before the court,

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with the reasons of his claim to detain them. The learned judge held that the court had jurisdiction under the first clause of section 14 of the act of 1789. I do not propose to notice critically the grounds on which he asserted the jurisdiction of the court. For reasons stated before, I am clear in the opinion that the construction given by Judge Kane to the statute in question is essentially erroneous. With all my respect for his legal intelligence and ability, I can not acquiesce in his conclusions. And the authority of his opinion is certainly not strengthened by the fact that no other case has been reported in which this latitudinous claim of jurisdiction has been judicially affirmed.

In at least one case of respectable authority, a contrary doctrine has been strongly asserted. I refer to the case *ex parte Barry*, before noticed, in which Judge Betts, holding the Circuit Court of the United States for the Southern District of New York, refused to grant a writ of habeas corpus in a case, the facts of which were very similar to those now before this court, on the ground of a want of jurisdiction. The case was, substantially, that Barry, an alien, married in the city of New York; and having lived some years with his wife, and after two children were born, by reason of some unfortunate difficulty between them, they separated, one of the children being in the custody of the father and the other of the mother. In 1844, Barry, for the purpose of obtaining the custody of the child remaining with the mother, filed his petition in the Circuit Court of the United States for a writ of habeas corpus, alleging a lawful right to the child as the father, and that the child was illegally and forcibly detained by the mother. Judge Betts refused to award the writ, on the ground before stated. I have seen no full report of his opinion, but it is referred to in 5 Howard, 103, and from the report it appears that Barry obtained a writ of error from the Supreme Court, to reverse the judgment of Judge Betts. This writ was dismissed by the Supreme Court, on the ground that there was no pecuniary

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amount in controversy, and that the court therefore had not jurisdiction. Two of the points of Judge Betts' decision are stated in the report of that case as follows: "I deny the writ of habeas corpus prayed for, because: 1. If granted, and a return was made, admitting the facts stated in the petition, I should discharge the infant on the ground that the court can not exercise the common law functions of *parens patriæ*, and has no common law jurisdiction in the matter. 2. The court has not judicial cognizance of the matter, by virtue of any statute of the United States.

The conclusions thus stated by Judge Betts accord fully with my judgment. I have before given some of the reasons for the opinion, that the statute does not grant the power claimed for the court in this case. And that view is, I think, decisive of the pending question. But it is contended in argument, that if it should be held that the statute does not confer the power, as a matter of substantive and independent jurisdiction, the writ of habeas corpus is proper as an ancillary process, to enable the court to exercise jurisdiction. If I understand the argument on this point, it is, in substance, that the child who is the subject of this controversy, legally owes labor and service to the petitioner, as her father; that she has escaped from the State of New York, where such labor and service were due, into the State of Ohio, and is subject to reclamation as a fugitive, by the father, under the acts of Congress of 1793 and 1850; and that the writ issued in this case is in aid of the jurisdiction of this court, under said acts, and therefore within the scope of the first clause of section 14 of the act of 1789. I shall notice this position very briefly, remarking, in the first place, that it would be, in my judgment, a perverted construction of the acts for reclaiming fugitives from service, to hold that they can have any application to a female child of eight years of age. Such a child, within the contemplation of these statutes, can not be said to owe labor and service to the father. And again, it is clear there has been no such escape as within the pur-

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view of these statutes is required, to bring a person within their operation.

There must be an escape, implying the will or purpose to escape, which certainly can not be predicated of an infant child. But there is a still more conclusive objection to the construction insisted on. The clause authorizing a habeas corpus in aid of the jurisdiction of a court, clearly contemplates a suit or proceeding *in esse*, and that such writ is necessary as subsidiary to the exercise of jurisdiction. It would vest the courts with a dangerous amplitude of discretion, if they could use the writ of habeas corpus as an instrument to bring a party within its jurisdiction for an ulterior purpose.

The jurisdiction, then, does not exist on the ground just indicated—and I am equally clear there is no other ground on which it can be sustained. I do not say it is not within the competency of Congress to give the power claimed to the courts or judges of the United States. The constitution includes in the grant of judicial power controversies between citizens of different States, but there is no statutory provision which brings the proceeding by habeas corpus within the scope of this provision. Section 11 of the act of 1789 gives to the Circuit Courts original cognizance concurrently with the State courts, of all civil suits at common law and in equity, where the plaintiff is a citizen of a State other than that in which suit is brought, and the matter in dispute exceeds five hundred dollars. But this does not include a proceeding by habeas corpus, for the plain reason, if there were no other, that the matter in controversy has no pecuniary value, and can not be estimated in money.

It follows, as the result of these views, that this proceeding must be dismissed, for want of jurisdiction. If I entertained a serious doubt on this question, I should hesitate to exercise the power invoked for this court. But, in the light in which I view it, the line of duty is so clearly indi-

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cated, that I should be wholly without excuse if I did not follow it.

This result renders it wholly unnecessary to express an opinion as to the effect of the record in the proceeding in the State court, or to review the evidence introduced by the parties.

(CIRCUIT COURT.)

ALFRED WINTERMUTE, ASSIGNEE, v. DANIEL SMITH.

Where a deputy marshal was regularly appointed by a marshal, and duly sworn as deputy, but no return of such appointment was made by the marshal to the district judge, such omission did not affect the legality of the service of subpoenas made by such deputy, nor deprive him of the right to his fees.

A deputy marshal is not entitled to charge for service or mileage for himself as a witness.

Though the service is rendered by the deputy marshal, the fees legally belong to the marshal, and his receipt for them operates as a discharge from liability for such service.

A deputy marshal's remedy for compensation is against the marshal for whom he performed the services.

G. M. Lee, for plaintiff.

Thomas Ewing, Jr., for defendants.

OPINION OF THE COURT:

The writs in this case were returned as served by Samuel Dolph, deputy marshal, and the fees for mileage and service by the deputy indorsed on the writs. The clerk has taxed these costs thus charged by the deputy marshal for mileage and service. In this case, judgment has been entered against the plaintiff for costs. The plaintiff now moves to have the taxation corrected by striking out the fees charged by Dolph, as deputy marshal, including traveling fees for services. It appears that, prior to last October term, there

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had been an agreement between Wintermute, as counsel for the plaintiff, and Ewing, as counsel for the defendants, that the subpoenas should be served without the intervention of an officer, the service to be acknowledged by the witnesses. This arrangement was made to save costs to the parties.

Prior to the service of the writs, Wintermute wrote to one Anderson, at Newark, inclosing the subpoenas, and referring to the arrangement with Ewing, but saying he would not trust to that, and directing that they should be served by Dolph, who he says was a regular deputy marshal. Dolph served the subpoenas, and made return as before stated. Several of the persons served say they acknowledged service of the subpoenas, but no such acknowledgement appears on the writs. Dolph swears in his affidavit that he served the writs. The question is, whether, under these circumstances, Dolph is entitled to his fees. It is alleged that he was not a deputy. It is proved that he was regularly appointed by the late marshal, and duly sworn as a deputy; but no return was made by the marshal to the district judge of the appointment of Dolph as a deputy. This omission, if duly appointed and sworn, would not affect the legality of the service of the subpoenas so as to deprive the deputy of the right to fees. He is not, however, entitled to charge for service or mileage for himself as a witness, and the fees so charged must be stricken out. It seems there has been a full settlement of the marshal's fees by the plaintiff in all these cases, who holds receipts for the payment of them, embracing a release from all further liability to the marshal for his fees. There can be no doubt the fees belong legally to the marshal, and he controls them, though the service is rendered by a deputy. All writs are directed to the marshal, and he is supposed to serve them, and the writs are returned by the marshal as served by deputy.

The marshal's receipt must operate as a discharge of the plaintiffs, so far as the marshal's fees are concerned, and I do not see how they can be collected by the plaintiff. But

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still there is no ground for an order to retax the costs, as they do not appear to have been illegally taxed. I suppose, however, the clerk would be justified in making an entry in such case, that the marshal's fees for the service in question had been satisfied. The marshal's receipt would be sufficient authority for this. Dolph's remedy for compensation for his services is against the marshal for whom he performed the services. The court can not, therefore, make a formal order for the retaxation of these costs. This seems not to be necessary, according to the views of the court, as before intimated.

Motion overruled.

(CIRCUIT COURT.)

MARTIN BELL v. HIRAM G. DANIELS AND CYRUS NEWKIRK.

A patentee is not controlled by the title of his patent, but the patent, the specification, and the drawings are all to be examined, and are all to have a fair and liberal construction in determining the nature and extent of the invention.

A patent can not be valid for a principle merely, but must be for the application of the principle to some practical and useful purpose.

The patent raises the presumption of utility, and the jury are not to conclude that there is no utility in an improvement because of its apparent simplicity, nor from the fact that it may not be the best mode of effecting the result. This last consideration would affect the value of the patent, but not its validity.

Others may have made suggestions to the patentee as to the possibility of making the improvement subsequently patented; they may have thought upon the subject and made experiments with reference to it, but unless their experiments resulted in discovery, such approaches to invention would be no bar to the granting of a patent to one who succeeded in making the discovery and perfecting it.

An abandonment or dedication to the public of an invention may be made as well after patent granted as before; but when the patent has actually been granted, it would undoubtedly require a strong case to prove abandonment.

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The effect of a *caveat* is to protect the claim of an inventor from all interfering applications made within one year after its filing, by requiring the office to notify him of such applications, that he may resist the interference if he chooses. But if, during the time which elapses between the filing of his *caveat* and his application, he allows his invention to go into public use, his *caveat* will not protect him.

B. made application for a patent in January, 1838. Some objections were made by the office, and, finally, an amended specification was filed in March, 1840, upon which the patent issued. There was no evidence that the patentee withdrew or abandoned his application of 1838: *Held*, that the two years during which the invention might be used before the application without working abandonment, must be dated back from January, 1838.

There is no infringement of a patent for a combination, unless all the essential parts of the combination are substantially imitated.

There is no unbending or unyielding rule of damages, but the rule generally recognized as the true one is to give, as damages, the amount of profits saved to the defendants by the unlawful use of the plaintiff's invention.

THIS was an action on the case, tried by the Court and a jury, to recover damages for the alleged infringement of letters patent for an "improvement in the mode of applying the waste heat of blast furnaces to steam boilers," granted to plaintiff, June 10, 1840. In the apparatus described in the specification the boilers stood on the stack by the side of the tunnel head, with which they were connected by a short flue. The heat and gas passed by this flue to the end of the boiler nearest the tunnel-head, thence to the end of the boiler, thence back under the other boiler (the boilers being separated by a brick partition wall dividing the fire-bed longitudinally), and so out through a chimney.

The claim of the patentee was as follows:

"The arrangement of flues and their necessary appendages by which the flame and gas escaping from the tunnel-head are applied to the boilers for the creation of steam."

In the defendants' apparatus, the two boilers, having one common flue or fire-bed without partition, were placed directly over the tunnel-head, the gas striking them at one

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end, passing under both together to the opposite end, and thence out through a chimney. This apparatus was used for four hundred and thirty-nine working days before the expiration of plaintiff's patent.

In relation to the history of the invention, it appeared in evidence that the boilers had been put up in various places during the years 1836 and 1837. That the plaintiff commenced experimenting as early as 1834, and continued to experiment until January, 1837, when he filed a *caveat*. In January, 1838, he filed his specifications, and made his application for a patent, but, having claimed the "application of the waste heat to boilers in any manner," instead of the mode which he had invented and described, his patent was rejected. He filed another specification (without withdrawing the first application), in which the same machine was described, but with a different claim. This was filed in March, 1840, and on June 10, 1840, the patent issued.

G. M. Lee and S. S. Fisher, for plaintiff.

C. Fox and H. H. Hunter, for defendants.

CHARGE OF THE COURT:

The claim in this case is for the infringement of a patent right. The defendants have plead the general issue, and filed a notice setting up the various defenses upon which they rely. The first of these denies the validity of the patent on its face, and is a question for the consideration of the court. The patent is for "a new and useful improvement in the mode of applying the waste heat of blast furnaces to steam boilers." The plaintiff is not controlled by his title, but the patent, specification, and drawings are all to be examined, and are all to have a fair and liberal construction, in determining the nature and extent of the invention. The statute requires that the patentee shall describe his invention in such clear, full, and exact terms as

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shall enable any person skilled in the art to which it relates to construct or apply the invention. The defendants insist that these specifications are defective for uncertainty and ambiguity, because they do not state what are the "necessary appendages" to the flues, and, because the claim is for the application of heat to boilers to produce steam, or merely a claim for a principle. The plaintiff, in his specification, describes his improvement as "consisting in the manner of applying the waste heat of furnaces to the generation of steam in steam boilers," and alleges that the object of his specification is to afford practical directions for the use of his improvement.

In his summing up, or conclusion, to which we must look, in order to determine precisely what the patentee claims as his invention, we find that his claim is for "the arrangement of flues and their necessary appendages, by which the flame and gas escaping from the tunnel-head are applied to the boilers for the creation of steam." The court has had occasion to construe this specification and claim in a former trial. In the case referred to, a motion for a new trial was fully argued, Judge McLean being present. Both judges held that the words, "arrangement of flues and their necessary appendages," as used by the patentee, were equivalent to a combination of mechanical structures producing the result stated. It is true that a patent can not be valid for a principle merely, but must be for the application of a principle to some practical and useful purposes; but in this case, it is not claimed as a discovery that heated air applied to a boiler will make steam, but that the mode of applying the heated air of a furnace in a way to save fuel and labor has been discovered, the invention patented consisting in the contrivances by which the hot air is applied. These contrivances, as described in the specification, are called flues and their appendages, and consist of: 1. The mode by which the heated air passes from the top of the stack into the flues. 2. The mode of bringing the heated air in contact with the boilers, which

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is by means of a flue passing under one boiler and then under the other, and escaping through an outlet at the end of the boilers at which it entered; and 3. The position or arrangement of the boilers. Neither the boilers, the flues, nor any of the appendages are new, but the claim is that the combination of the whole is new and useful. And there would seem to be no doubt that this is a patentable combination, including the application of principles, not separately claimed to be new, to the production of a new and useful result.

Upon the question of utility, it may be remarked as a familiar principle that the patent raises the presumption of utility, yet the defendants may show, in order to defeat the patent, that the invention is worthless, though, if it appears that it is in any degree useful, the patent will be sustained. The plaintiff has offered proof by Dr. Fisher and Mr. Foster of the utility of this mode of heating boilers, and it will be for the jury to say, from this and all the testimony, whether his invention is, in fact, of any value. In doing this, they are not to conclude that there is no utility in the improvement from its apparent simplicity, nor from the fact that it may not be the best mode of effecting the result. This last consideration would affect the value of the patent, but not its validity. As to the novelty and originality of the improvement patented, the court will again remark that the patent itself raises a presumption in favor of both. The statute, however, requires that the invention shall be new, and if the defendants can show that it was known or in use prior to the patentee's application for a patent, the plaintiff can not recover. This defense is set up in the present case. It is not claimed, indeed, that the combination as such is not new; that is, that it was ever before applied to produce the result claimed for it; but it is insisted by the defendants, that the invention is not new and original, because heated air has been before applied to other purposes. The test of novelty, as applied

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to a combination, seems to be, whether the application of heated air, by such means and appliances as the plaintiff claims to have invented, has been before known as an agent for raising steam in boilers, for, as already stated, this is a principle of the plaintiff's invention, and the fact that heated air had been before used in a different way and for a different purpose, would not be within this principle and would not defeat the patent for want of novelty. In this connection, I remark that it is no evidence of such a prior knowledge of the invention as will defeat the patent, that other persons have made suggestions to the patentee as to the possibility of making the improvement subsequently patented. Others may have thought upon the subject, and made experiments with reference to it; but unless they accomplished the object, unless their experiments resulted in discovery, such approaches to it would be no bar to the granting of a patent to one who was successful in making the discovery and perfecting it.

But it is claimed that if the plaintiff was the inventor of a patentable subject, there is evidence of a prior public use of his invention which invalidates his patent, and that such prior use was under the authority, and by the concurrence of the plaintiff. The statute provides that if the patented structure or improvement has been in public use, or on sale, for two years prior to the application for a patent, with the consent and allowance of the patentee, the patent shall be void, and whether there was or was not such prior use, will be a question of fact for the jury. In the present case, the witness, Spear, says that in 1837, he put up boilers for his father-in-law, on the plan of Bell's patent, in Huntington county, Pennsylvania, with the knowledge of Bell, and with his consent. E. Soden states that, in 1836 or 1837, his brother, by the consent of plaintiff, put up boilers in Tennessee. James Bell states that the boilers put up by Spear were put up under the supervision of the patentee, and for the purpose of further experiments. It will not be necessary to decide whether this was

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a public use of the invention, within the meaning of the statute, if the jury are satisfied that such use was not more than two years before the date of Bell's application for a patent. It appears that in January, 1837, the plaintiff filed a *caveat* in the Patent Office; and on January 26, 1838, he filed his application. Upon this application, the Patent Office refused to issue a patent. It was amended in March, 1840, and on June 10, 1840, the patent issued.

The effect of the *caveat* is to protect the claim of an inventor from all interfering applications made within one year after its filing, by requiring the office to notify him of such applications, that he may resist the interference if he chooses. But if, during the time which elapses between the filing of his *caveat*, and his application, he allows his invention to go into public use, his *caveat* will not protect him. The only question upon this point, therefore, for the jury, will be whether the boilers put up by Spear and Soden were put up less than two years before the date of Bell's application. If so, they are within the exception of the statute, and the defense that the invention had been in public use two years prior to the application fails. It is, however, insisted by the defense that the application made by the plaintiff, in January, 1838, can not protect him from the legal effect of allowing his improvement to go into public use, for the reason that the Patent Office rejected that application; that, therefore, it must be regarded as a nullity, and that the application for the patent must be dated from March, 1840, and not from January, 1838. This question is decided by section 7 of the act of 1836. That section provides that when a patent is refused, the application shall still be in force, unless the applicant, in a manner pointed out, elects to withdraw it. In this case, Bell made no such election; but he filed an amended specification in 1840, under which the patent issued. This amendment of the original specification, having been provided for by the section above referred to, the court has no difficulty in holding

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that the application of the plaintiff must date from January, 1838.

The question of abandonment has been raised in this case, and it will be the duty of the jury to pass upon it. If an inventor, by his actions and consent, shows that he has made a dedication of his invention to the public, he can not afterward disavow such a dedication, and obtain a patent; and, therefore, if the jury are satisfied, from the evidence, that this patentee has permitted his invention to go into public use, without objection, and without taking any steps to vindicate his rights, he will be viewed as having given his improvement to the public, and will not be permitted afterward to resume it. This abandonment, or dedication to the public, may be made as well after patent granted as before; but, where the patent has actually been granted, it would undoubtedly require a strong case to prove abandonment.

The doctrine of the law upon this and the preceding points may be briefly stated thus: that if the jury find that the invention was used by others, or even by one person, with the consent or allowance of the inventor, publicly, and for more than two years before the application for a patent; or if they find that it was publicly used for a long period by the inventor himself, not in the way of experiment, but for gain, in either case the patent is void.

If the jury shall be satisfied that this is a patentable invention, that it is new and useful, and has not been abandoned, or permitted to go into public use for more than two years before the application, they will then inquire whether the defendants have infringed the plaintiff's patent. This is a question of fact for the jury. It must be proved by the plaintiff, for the burden of proof is upon him, and to sustain his case he must prove that the defendants have either used his invention, or something substantially like it. To this end, he has introduced two witnesses—Dr. Fisher and Mr. Foster—both of whom testify that the two structures are substantially the same. The jury will, how-

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ever, be guided by all the evidence in the case, as well the examination of the models and drawings, and of the patent itself, as by the testimony of the experts whose opinions have been laid before them. The court has already stated that it regards the claim of the plaintiff, as set forth in his specification, as being, substantially, a claim for a combination of known mechanical structures to produce a new and useful result. The defendants contend that they have not used all of the parts of this combination, and therefore insist that they are not liable for an infringement. It is undoubtedly true that the use of one or more parts of a combination is not an infringement, and if the defendants have not used all the flues or appendages claimed by the patentee they have not infringed. If the specification requires a flue for conducting the heat from the tunnel-head to the boilers, and the jury find that the defendants have not used such a lateral flue, or anything equivalent to it, then there is no infringement, for the patentee can not abandon any part of his improvement which he claims in his specification as material.

If he has claimed the lateral flues as a material part of his invention, he is not now at liberty to say that it is no part of his patent. In this specification, the plaintiff describes also the flues under the boilers, formed by a division wall; the defendants use no such division wall, but the heat passes under both boilers at the same time. The defendants, therefore, insist that they do not use the plaintiff's arrangement of flues, and that there are in fact no flues in their structure. It will be for the jury to say whether this constitutes a substantial difference in the two machines; if so, the defendants have not infringed. As has been before remarked, they must use substantially all the parts of the plaintiff's combination, in order to be guilty of an infringement of his patent. If they do this: if they include in their contrivance, substantially, all the principles of the plaintiff's combination, it will be no defense that the structure used by them is better in its effects than that patented

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by the plaintiff. If the jury believe that none of the foregoing defenses are sustained, and that the defendants have infringed, they will then inquire what damages the plaintiff shall receive. This is wholly within the discretion of the jury, though no claim is made in the present case for anything beyond compensatory damages. There is no unbending or unyielding rule of damages, though that usually recognized as the true rule has been to give to the plaintiff, as damages, the amount of profits which the defendants have derived from the use of the plaintiff's improvement, not the amount which they might have realized, or which they made from the use of improvements other than those of the patentee, but what they actually did make by the use of the machine as patented. In this case, it is claimed by the plaintiff that the jury have the data for ascertaining the defendant's profits, in the value of the coal saved by the use of the plaintiff's invention. This would seem to be a satisfactory basis. The furnace was run four hundred and thirty-nine days. The witnesses differ greatly as to the quantity of coal that would be required to make the necessary steam by the old method, but it will be for the jury to say what the quantity should be. As before remarked, the whole subject of damages is with them, and they will give such an amount as in their judgment seems proper, under the evidence. There are no doubt cases in which the license price may be a criterion, but there are few instances in my judgment, in which, where his invention is pirated, the patentee ought to be concluded by a former offer to sell.

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(CIRCUIT COURT.)

COOLIDGE AND DUBARROW v. NICHOLAS G. CURTIS ET AL.

In Ohio, a failing debtor may prefer creditors by assignment or otherwise, if done under circumstances which repel the inference of a fraudulent purpose.

If the construction of a State statute has been settled by the decision of the highest court of the State, the courts of the United States uniformly adopt such construction.

The Supreme Court of Ohio have decided that the act of March 14, 1853, "declaring the effect of assignments to trustees, in contemplation of insolvency, and the statute of 1838, of the same import, do not affect assignments or transfers made for the sole benefit of the assignees or transferees; but if made trustees for other parties, the statute applies, and the property is held for the equal benefit of all the creditors."

But no trust will be implied merely from the fact that an assignment or transfer has been made by an insolvent debtor to indemnify a surety for such debtor, if no more property has been assigned than was necessary for that purpose and the facts warrant the presumption that nothing was designed but the *bona fide* indemnity of the surety.

Although such surety may be liable to respond to the creditors not provided for, for any surplus after paying the debts for which he was bound, he is not a trustee within the contemplation of the statute referred to.

Worthington & Matthews, and Thompson & Nesmith, for plaintiffs.

Fox & Fox, James Clark, and Thomas Milliken, for defendants.

OPINION OF THE COURT:

The plaintiffs allege in their bill that the defendant, Nicholas G. Curtis, is indebted to them in the sum of \$1,368, to recover which, a suit at law is now pending in this court, in which certain property, claimed by other parties, has been attached as the property of said Curtis. They also set forth that Curtis, in contemplation of insolvency, assigned and

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transferred to the defendants, Wilkinson Beatty, Joseph Curtis, Thomas Moore, and others, all his property for the purpose of preferring creditors in Ohio, to the exclusion of those residing in eastern cities. The object of the bill is to charge the persons just named as trustees of the property transferred to them, for the benefit of all the creditors of Curtis; and the prayer is, that a receiver may be appointed to take possession of the property, and hold the same subject to the further order of the court, and that, on the final hearing, the proceeds may be apportioned equally among all the creditors.

The defendants, in their answer, admit the insolvency of N. G. Curtis, as averred in the bill, and allege that the sale or assignments of property or assets to them, was made in good faith to pay or secure debts justly due them, and indemnify them for liabilities incurred for said Curtis, by indorsements and other modes of suretyship. They deny any sale or assignment to them in trust, for the benefit of any other creditor; or that they received or hold property, as trustees, either expressly or by legal intendment.

Referring to the bill, it will be seen the plaintiffs do not ask for the cancelment of the alleged assignments or transfers as illegal and void, on the ground of fraud; but they insist that they fall within the operation of the statute of Ohio, passed March 14, 1853, "declaring the effect of assignments to trustees, in contemplation of insolvency;" and that they inure to the equal benefit of all the creditors of Curtis. The important question in this case, therefore, is, whether the parties to whom the assignments or transfers have been made by the debtor, are trustees within the meaning of the statute referred to.

There are three separate transactions stated in the bill, and insisted upon in the argument, as within the operation of the statute. I will first notice the sale of the stock of goods by N. G. Curtis to Beatty. The answers of the defendants, Curtis and Beatty, and the evidence on file, sufficiently show, that for several years prior to the autumn

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of 1857, Curtis had been engaged in the dry goods business, at Hamilton, in Butler county, Ohio. He had become greatly embarrassed in his pecuniary affairs. His paper had been protested and suits had been brought against him on claims which he was unable to meet. His friends and others in the community regarded him as insolvent, and it was apparent he could not continue his business. He was in possession of a stock of dry goods, nominally worth, at the invoice prices, about \$31,000, and he had notes and book accounts amounting to about \$20,000, but available for not more than half that sum. He had previously owned real estate worth from \$6,000 to \$8,000, which had been mortgaged for its entire value. His debts amounted to about \$66,000, of which \$30,000 was due to persons residing in Butler county, and \$36,000 to creditors in New York and Philadelphia. He was indebted to Beatty in the sum of \$4,453, and Beatty was liable for him, as indorser and otherwise, in the sum of about \$2,650. Beatty was a citizen of Butler county, of large pecuniary means, and of respectable standing. On November 19, 1857, after a good deal of conference on the subject, Curtis agreed to sell his entire stock to Beatty, and a written agreement of sale was executed by the parties. This agreement purports in its terms to be an absolute and unconditional sale of the goods. It provides, among other things, that the goods shall be invoiced by three persons named in the writing, and that Beatty shall pay for them at the rate of sixty-six and two-third cents on the dollar, of the cost or invoice prices. At the invoice prices the stock amounted to \$31,000; and at the rate agreed on, the sum to be paid by Beatty was about \$20,666. He executed his notes for \$16,666.66. These notes, at the request of the counsel of Curtis, after the sale and while the invoice was in progress, were given in sums to enable Curtis to transfer them to creditors, in payment, or as collateral security for debts. Though not stated in the written contract, it was the un-

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derstanding of the parties, that Beatty should have a credit on the purchase to the amount of the debt due from Curtis; and this arrangement was carried into effect in giving the notes. It is in evidence that these notes were delivered to Curtis, and by him transferred to creditors, in some cases as absolute payment, in others as collateral security.

In his answer, which is sworn to, Beatty avers that the purchase of the goods by him was in good faith; that he paid the full value for them; and that his sole object was to secure the debt due him, and obtain indemnity as security; and that at the time of the purchase he had no knowledge of any intention by Curtis to prefer a portion of his creditors.

It is, perhaps, not material to notice, that before the invoice of the goods was completed, they were attached by process issued from this court, as the property of Curtis, and subsequently taken from the custody of the marshal by a writ of replevin from the Court of Common Pleas of Butler county, and delivered to Beatty, who has since sold the entire stock.

The transactions between N. G. Curtis and Joseph Curtis, referred to in the bill, are briefly these: prior to the sale to Beatty, N. G. Curtis was indebted to Joseph Curtis, directly, by note and book account, in the sum of \$568. Joseph Curtis was liable, as the indorser of N. G. Curtis, on paper held by the banking firm of Shaffer, Curtis & Potter—of which Joseph Curtis was a partner—in the sum of about \$12,471; and he was also liable as the guarantor of other paper of N. G. Curtis, held by said banking house, to the amount of \$4,982.84; making an aggregate of indebtedness and liability, as surety, of \$18,021. It also appears Joseph Curtis was contingently liable for N. G. Curtis, as surety on a bond to the treasurer of the school board of the city of Hamilton, and also on other bonds given by him in a fiduciary character.

Immediately after the sale to Beatty, N. G. Curtis transferred several of the notes given for the goods to Joseph

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Curtis. These notes were payable at different times, from four months to three years, and amounted to \$7,000, but with the rebatement of interest were worth only \$6,340. In addition to this, N. G. Curtis assigned to Joseph Curtis notes and book accounts amounting nominally to \$8,352, but worth not exceeding the half that sum. The parties both swear that these transfers were made for the sole purpose of securing Joseph Curtis, and without any purpose, express or implied, that the latter was to hold the assets as a trustee, or for the benefit of N. G. Curtis, or any creditor but himself.

In relation to the transfers to Thomas Moore, it appears that N. G. Curtis was indebted to him directly, in the sum of \$500, and that Moore was liable as indorser for \$1,718. Curtis transferred to Moore one of Beatty's notes for \$1,440, due in three years from its date, without interest, and worth only \$1,200, together with sundry small accounts, of the nominal amount of \$1,000, but really not available for more than fifty per cent. of that sum. Curtis and Moore state in their answers, that these transfers were in good faith, and intended solely to indemnify Moore, and not in trust for any purpose.

The bill also avers a transfer of a portion of his stock of goods by N. G. Curtis to Levi S. Curtis. It will not be necessary to notice this transaction or to decide whether fraud may not be implied in connection with it. The sale has been annulled by the parties, and it is in evidence that the goods have been delivered by N. G. Curtis, in payment of *bona fide* debts.

The question arising on these facts is, whether the sale to Beatty, and the transfers to Joseph Curtis and Thomas Moore, or any of them, import assignments in trust to prefer creditors within the meaning of the act of March, 1853.

The statute provides "that all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, shall be held to inure

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to the benefit of all the creditors in proportion to their respective demands; and such trusts shall be subject to the control of the courts, which may require security of the trustees for the faithful execution of the trusts, or remove them and appoint others, as justice may require."

A statute, identical in its terms with that just quoted, with one unessential exception, was passed by the legislature of Ohio in 1838, and was in force until the act of 1853 took effect. Under these statutes a number of cases have been before the Supreme Court of the State, and their purpose and meaning seem now to be well settled. In accordance with the approved and established practice of the federal courts, affirmed by repeated decisions of the Supreme Court of the United States, this court, in giving a construction to the statute under consideration, will be guided by the decisions of the Supreme Court of the State. The cases which have arisen under the statute have been referred to in the argument of counsel, and such of them as bear upon the question before the court will be noticed.

Before referring to these cases, it may be remarked that prior to the passage of the act of 1838, declaring the effect of assignment in trust, by a failing debtor, to prefer creditors, it had been held by the Supreme Court of the State that such debtor could lawfully prefer a creditor, if the preference was in good faith, and under circumstances repelling the presumption of a fraudulent purpose; and since the enactment of that law, the validity of such a preference has been affirmed, unless made through the intervention of a trustee, in which case, under the statute, the assignment is not void, but inures to the equal benefit of all the creditors. It is, therefore, settled law in Ohio, that a debtor, in a state of insolvency, may pay a creditor his entire debt, although such payment may operate to the injury of other creditors; and it can make no difference whether the payment is made in money or in property. A debtor may also, indirectly, give preference to a creditor by confessing a judgment, and thus enabling the creditor to obtain a priority,

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by the levy of an execution on the property of the debtor. It is equally clear that the debtor may dispose of his property by an absolute sale, if no fraud is intended, and pay the proceeds to some of his creditors, in exclusion of others. In these cases, in the contemplation of law, the creditor is entitled to the benefits resulting from his diligence. It is not clear of doubt whether this right of preference, even with the limitation stated, can be vindicated either on the basis of strict morality or commercial expediency. A *pro rata* division of the proceeds of an insolvent debtor's property among all his creditors, under all circumstances, and an unconditional prohibition of all preferences from the actual occurrence of insolvency, is more accordant with all our views of justice and fair dealing. But the law on this subject is now too firmly settled in Ohio, by the adjudications of her courts, to be changed, except by positive legislative interposition.

In the case before the court, there is no reason to doubt that, in the sale to Beatty, and in the transfer of assets to Joseph Curtis and Thomas Moore, the debtor, with a knowledge of his insolvency, designed to provide for creditors residing in Butler county, leaving his eastern creditors to share *pro rata* whatever residuum there might be. The evidence is clear that he made declarations, before the sale to Beatty, of such a purpose; and, especially, that he intended to secure those who had become his sureties. Beatty, in his answer, denies that, at the time he purchased the stock of goods, he had any knowledge of Curtis' intention to prefer his home creditors. It is not material to inquire, in the decision of the questions arising in this case, whether Beatty, or the other parties to whom transfers or assignments were made, were cognizant of such a purpose. If the insolvent debtor could lawfully sell or transfer his property, intending to prefer certain creditors, the knowledge of such intention, by the parties preferred, can not affect the question whether the transactions are within the operation of the statute.

The legal right to prefer a creditor, to whom the insolvent

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debtor is directly indebted, is not denied by the counsel for the plaintiffs, but they insist, if property is assigned to indemnify against loss as a surety for such debtor, the assignee holds the property in trust for the creditor for whom he is surety, and may be called on to account in equity for the property assigned; and, therefore, that such assignment falls within the statute by necessary implication.

In the case before the court, there is no claim that there was an express trust in the sale to Beatty, or in the other transfers made by Curtis. If, therefore, a trust can be predicated of the facts in proof, it must be implied, and does not result from the patent acts of the parties. And this presents the question, whether a trust can be implied from the fact that the sale and transfers of property were designed, in part, for the indemnity of sureties. The decisions of the Supreme Court of Ohio uniformly sustain the principle that, under the statute, an assignment or transfer of property, by a failing debtor, intended to prefer certain creditors, is not within its intention or scope, unless such preference is to be effected through the agency of a trustee. But, in determining whether a trust is created, within the meaning of the statute, that court holds that a strict construction is not to be given to the assignment or transfer, and that, without regard to form, the nature and character of the transaction must have the controlling influence. Thus, in the case of *Hokrader et al. v. Leiby et al.*, 4 Ohio St. 602, the court say, "After a very careful examination of the subject in all its bearings, we are unanimously of the opinion that our statute requires us to hold, that when any valuable interest of the insolvent debtor is transferred by any species of conveyance, binding the recipient, either expressly or by necessary implication, to account in chancery, to any creditor of the assignor, the statute enlarges the trust, and makes it inure to the benefit of all his creditors, and distributes the fund to all, in proportion to their respective demands." And in the same case the court say, "To bring a case within the operation

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of the law, there must be a transfer or conveyance of property, or some valuable interest belonging to the insolvent debtor, in view of his insolvency, to be held by the person taking it, for the benefit of some one or more of the creditors of the debtor, other than himself." The same principle has been substantially affirmed in other cases, to which it is not necessary specially to refer.

It is now proper to inquire, whether the several transactions, under consideration in this case, or any of them, are within the principle thus laid down by the Supreme Court of Ohio. And a reference to the cases decided by that court leads to the conclusion, not only that a failing debtor may indemnify a surety by transferring property to him, but that such a transfer does not raise a trust by implication, or necessarily impose an obligation on the transferee, to account to other creditors for the property transferred.

The case of *Atkinson et al. v. Tomlinson et al.*, 1 Ohio St. 237, seems to be in point on this question. In that case, an insolvent debtor assigned his entire property to two persons, to indemnify them as sureties. The property so assigned was sold by the sureties, and the proceeds were applied in payment of the debts for which they were liable. Other creditors filed their bill, charging fraud in the assignment, and praying for a *pro rata* distribution of the proceeds of the property. The court held the assignment to be valid. In the conclusion of their opinion they say: "Now, in the present case, the defendants were the sureties of Tomlinson; they took an assignment of about enough property to pay off their liabilities for him; and although they showed themselves very anxious to obtain the security, as all men would, under similar circumstances, yet securing themselves appears to have been their sole object; and we think they had a legal right to do it."

In the case of *Bloom v. Nogle*, 4 Ohio St. 56, the court say: "It has been fully settled by repeated decisions of this court that a creditor of an insolvent debtor, or one having assumed liabilities for him as surety, may lawfully take from

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him a mortgage to secure such debt, or *save harmless from such liability*, and as the reward of his diligence, will be protected in the priority thus obtained;" and in the case of *Hokrader et al. v. Leiby et al.*, before cited, the court say: "The statute does not affect a mortgage given by an insolvent debtor to secure the debt of one of his creditors, or to indemnify him against a liability, by indorsement or otherwise, assumed for the benefit of the debtor, although it may have the effect to prefer such creditor."

From these and other cases that might be referred to, the principle seems well settled by the decisions of the Supreme Court of Ohio, that a mortgage or other transfer of property may be given by a failing debtor, not only to secure a debt due by such debtor, but also to indemnify a surety; and it is most obvious, that if the right to prefer a creditor has any foundation in justice, it should be extended to the case of a surety. It is not only a popular principle, but one which accords with the most obvious dictates of honor, that a surety of a failing debtor occupies a more meritorious position than any other creditor, and has a moral claim to indemnity superior to that of one who has become a creditor in the ordinary business transactions of life. Hence, it is an established maxim that sureties are favorites with courts of equity.

It is insisted, however, by the counsel for the plaintiffs, that the cases in the Supreme Court of Ohio, to which he refers, sustain the doctrine of an implied trust in all cases where a conveyance or transfer of property is made by an insolvent debtor, to indemnify a surety, and that the surety is liable to account for the proceeds of the property as a trustee; and, if so liable, the case comes within the statute. The cases relied on do not seem to sustain this position to the extent claimed. In those cases the court adjudged the conveyance or assignment to be within the statute, not because preferences were made to sureties, but because there was an express trust for the benefit of some creditor other than the grantee or assignee. Thus, in the

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case of *Hokrader et al. v. Leiby et al.*, the mortgage was held to be an assignment in trust to prefer creditors, because it was given for the benefit of persons who were not mortgagees, and that, as to them, there was a trust. The entire opinion of the court leaves no doubt, that if the mortgage had been given for the indemnity of the mortgagees only, as sureties of the debtor, the transaction would not be brought within the operation of the statute.

The case of *Dixon et al. v. Rawson et al.*, 5 Ohio St. 224, is relied on as sustaining the implication of a trust in the sale to Beatty, and the transfers to Joseph Curtis and Thomas Moore. But in the case referred to, the insolvent debtors assigned their property to some of their creditors, not only to secure them, but in trust that another person not named as an assignee, a surety of the debtor, should be indemnified for his liability. This was clearly a trust within the meaning of the statute; but there is no intimation in the opinion of the court, that a trust would be implied if the assignment had been solely for the benefit or security of the assignees. The judgment of the court was based on the fact that there was an express trust in favor of a person who was not an assignee. The court say, referring to the statute under consideration, "it does not in any way affect conveyances or mortgages made by a failing debtor to his creditors for the purpose of paying or securing his debts; but it does control every transfer or conveyance of property, whether by mortgage or otherwise, made by an insolvent debtor, in view of his insolvency, to be held by the person taking it for the benefit of some one or more of the creditors of the debtor, to the exclusion of others. To bring the case within the operation of the statute, the conveyance must be *in trust*, and the person receiving the property thereby constituted a *trustee* for some one or more of the creditors of the debtor, to the exclusion of others." In this opinion of the court there is no intimation of a doubt as to the correctness of the principles decided in previous cases, involving the construc-

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tion of the statute. It is, in fact, an affirmance of the decisions in those cases, and the court refer to them, by name, as "carefully considered cases."

The last case before the Supreme Court of Ohio is that of *Bagly et al. v. Waters et al.*, 7 Ohio St. 359. The material facts were, that a merchant, in failing circumstances, sold and transferred his stock of goods, notes, and book accounts, and also his real estate, amounting to about \$30,000, being the principal part of his property, to a person who, with others, was liable for him to the amount of about \$20,000, and who assumed the payment of the debts for which he was liable as surety, and also other debts which were specified in the written agreement between the parties. The creditors not provided for in this arrangement brought suit to charge the assignee, as a trustee, under the act of 1853.

The Supreme Court held that the statute does not prohibit a failing debtor from applying his property or means, to the payment in full of a part of his creditors, though nothing should be left for others equally meritorious. They say, "the sole object of the statute is to prevent his effecting this purpose by an assignment in trust;" and they hold, as there was no proof in conflict with the conclusion, that the agreement was what it purports to be, an absolute and unconditional sale of the property, in consideration of the promise of the vendee to pay certain debts, for a part of which he was surety, no trust to prefer creditors could be implied, and that the assignment was not within the statute.

The case just referred to, in some of its aspects, is similar to that before the court, and would seem to be conclusive on the question now to be decided. The assignment in that case was made for the sole purpose of indemnifying a surety, who, it would seem, in addition to his legal liability to pay the debts, as surety, had expressly assumed their payment. The court held, that although the assignee thus made himself responsible for those debts to the creditors, and would be bound to apply the proceeds of the property assigned or

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sold for that purpose, it was not an assignment in trust, as contemplated by the statute.

The facts in relation to the several transactions charged in the bill, as within the act of 1853, have been already stated. As to the stock of goods, the evidence leaves no room for a doubt that there was a positive, unconditional sale to Beatty, exclusively for his benefit and indemnity as a creditor of and a surety for Curtis. The goods were sold at their full value—in the opinion of several witnesses, for more than they were worth—and the notes given for the purchase were transferred by Curtis, with the knowledge and consent of Beatty, to creditors, either in actual payment of debts, or as collateral security. It is a fact, not controverted, that Beatty has the ability to pay, and, without doubt, will promptly pay these notes as they mature. It would seem clear, under the authorities that have been cited, that Curtis had the legal right to sell this property, with the purpose of preferring certain creditors, and that Beatty, with a view to his own security, had a right to purchase. In paying for the goods, he retained so much as was deemed necessary to pay the debt due from Curtis; and it was also a part of the arrangement that he should be indemnified to the extent of his suretyship for him. It would seem, however, from the evidence, that the difference between the value of the goods as appraised, and the notes given by Beatty, was something less than the actual indebtedness of Curtis to him; and hence there is no ground for an inference that there can be a residuum in his hands, for which he can be held liable to account to the creditors who are not provided for. There is, therefore, nothing in this transaction from which a trust can be implied, within the contemplation of the statute, or which can be a basis for a proceeding in equity, to charge Beatty as an assignee.

In reference to the transfers to Joseph Curtis and Thomas Moore, it would seem clear that within the principles of the decisions of the Supreme Court of Ohio, they also are

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protected from the operation of the act of 1858. They were separately creditors of the insolvent debtor, and they were liable for him as sureties. To pay the debts due them, and as an indemnity for their suretyship, notes and other assets were assigned to them respectively, less in amount in both cases than the sums for which they were liable. There is no evidence contradicting or disproving the allegations of their answers, that their sole object in this arrangement was to protect themselves from their liability, and both deny that there was any other purpose in view.

To bring an assignment within the operation of a statute, there must be, in the words of the statute, "a design to prefer one or more creditors to the exclusion of others;" and this purpose must be accomplished through the agency of a trustee. It is true, as already stated, that the insolvent Curtis intended to prefer some of his creditors, but such intention does not bring the transactions within the statute. The pertinent inquiry is, has he assigned property in trust for this purpose. In the case of *Bagley et al. v. Waters et al.*, before noticed, the court, in reference to the cases that had been before the court, involving the construction of the statute, say: "In each of them that has not been overruled, the instrument which was held to be an assignment in trust, gave to other creditors, besides the assignees, or reserved for the assignor, an interest in the property transferred, or in its proceeds, and thus laid the foundation for chancery jurisdiction, to compel an account." And again: "In each of them, it will be found that the assignee held the property as mortgagee, or, otherwise, in part, at least, merely to secure other creditors beside himself, or was to account for a residuum to the assignor. Such instruments might well be declared assignments in trust." And in the case of *Doremus et al. v. O'Harra et al.*, 1 Ohio St. 45, the court held, that "the statute of 1838, relating to assignments of the property of a failing debtor for the purpose of preferring creditors, does not embrace all cases of assignments made by such debtor, but refers only to those cases where the

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sold for that purpose, it was not an assignment in trust, as contemplated by the statute.

The facts in relation to the several transactions charged in the bill, as within the act of 1853, have been already stated. As to the stock of goods, the evidence leaves no room for a doubt that there was a positive, unconditional sale to Beatty, exclusively for his benefit and indemnity as a creditor of and a surety for Curtis. The goods were sold at their full value—in the opinion of several witnesses, for more than they were worth—and the notes given for the purchase were transferred by Curtis, with the knowledge and consent of Beatty, to creditors, either in actual payment of debts, or as collateral security. It is a fact, not controverted, that Beatty has the ability to pay, and, without doubt, will promptly pay these notes as they mature. It would seem clear, under the authorities that have been cited, that Curtis had the legal right to sell this property, with the purpose of preferring certain creditors, and that Beatty, with a view to his own security, had a right to purchase. In paying for the goods, he retained so much as was deemed necessary to pay the debt due from Curtis; and it was also a part of the arrangement that he should be indemnified to the extent of his suretyship for him. It would seem, however, from the evidence, that the difference between the value of the goods as appraised, and the notes given by Beatty, was something less than the actual indebtedness of Curtis to him; and hence there is no ground for an inference that there can be a residuum in his hands, for which he can be held liable to account to the creditors who are not provided for. There is, therefore, nothing in this transaction from which a trust can be implied, within the contemplation of the statute, or which can be a basis for a proceeding in equity, to charge Beatty as an assignee.

In reference to the transfers to Joseph Curtis and Thomas Moore, it would seem clear that within the principles of the decisions of the Supreme Court of Ohio, they also are

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protected from the operation of the act of 1858. They were separately creditors of the insolvent debtor, and they were liable for him as sureties. To pay the debts due them, and as an indemnity for their suretyship, notes and other assets were assigned to them respectively, less in amount in both cases than the sums for which they were liable. There is no evidence contradicting or disproving the allegations of their answers, that their sole object in this arrangement was to protect themselves from their liability, and both deny that there was any other purpose in view.

To bring an assignment within the operation of a statute, there must be, in the words of the statute, "a design to prefer one or more creditors to the exclusion of others;" and this purpose must be accomplished through the agency of a trustee. It is true, as already stated, that the insolvent Curtis intended to prefer some of his creditors, but such intention does not bring the transactions within the statute. The pertinent inquiry is, has he assigned property in trust for this purpose. In the case of *Bagley et al. v. Waters et al.*, before noticed, the court, in reference to the cases that had been before the court, involving the construction of the statute, say: "In each of them that has not been overruled, the instrument which was held to be an assignment in trust, gave to other creditors, besides the assignees, or reserved for the assignor, an interest in the property transferred, or in its proceeds, and thus laid the foundation for chancery jurisdiction, to compel an account." And again: "In each of them, it will be found that the assignee held the property as mortgagee, or, otherwise, in part, at least, merely to secure other creditors beside himself, or was to account for a residuum to the assignor. Such instruments might well be declared assignments in trust." And in the case of *Doremus et al. v. O'Harra et al.*, 1 Ohio St. 45, the court held, that "the statute of 1838, relating to assignments of the property of a failing debtor for the purpose of preferring creditors, does not embrace all cases of assignments made by such debtor, but refers only to those cases where the

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assignee stands in the character of a trustee, other than his merely receiving a conveyance to secure his own claim."

These authorities seem clearly to warrant the conclusion that no one of the several transactions in question in this case falls within the statute. In the sale to Beatty, and the transfers to Joseph Curtis and Thomas Moore, no trust can be implied in favor of any creditors other than the vendee or the transferees. The cases referred to establish the doctrine that, to the extent of their liability as sureties, they had a legal right to obtain indemnity by any species of assignment or transfer, which, in its benefits, was limited to them, and made no provision for a preference in behalf of any other creditor. This right being conceded, they can not be viewed as trustees under the statute. As sureties, the legal obligation to pay the creditors, to whom they stood in that relation, upon the failure or inability of their principal to make payment, was complete, and could not be affected by any assignment for their indemnity. The debtor was hopelessly insolvent; and their liability to pay the debts for which they were surety, rested upon no contingency. Their entire property—not only that assigned to them, but all they then owned, or might subsequently acquire—was liable for the payment of these debts. These considerations, in connection with the fact that no more property was placed in their hands than was necessary for their indemnity, strongly negative the existence of an implied trust, and repel the conclusion that they are chargeable, in equity or otherwise, as trustees under the statute. It may be conceded that if, after applying the proceeds of the property transferred to the sureties, there should be a surplus in their hands, the creditors not paid or provided for would be entitled to the benefit of such surplus. But their claim would not rest on the basis of an assignment in trust to prefer creditors, within the meaning of the statute, but upon the legal and equitable principle that one who holds money to which another is entitled, may be sued for its recovery. In the case of *Atkinson et al. v. Tomlinson*, 1

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Ohio St. 243, the court decide that a liability to account for a surplus, where property has been assigned or conveyed by a failing debtor, to pay a debt or indemnify a surety, does not necessarily raise a trust, within the scope and meaning of the statute. In illustration of the views of the Supreme Court on this point, they refer to the case of a mortgage given by such debtor, and remark in these words: "Now, it may be said that a mortgagee is, in some respects, a trustee; but this arises merely as an incident to his relation as mortgagee, and is not the kind of trustee designated in the statute."

The views thus indicated relieve the court from the necessity of expressing an opinion on the point made by the counsel for defendants, that a decree can not be rendered for the plaintiff, for the reason that all the parties in interest are not before the court. For the same reason, it is unnecessary to decide whether the proceedings in replevin, in reference to the goods purchased by Beatty, are an estoppel to the plaintiffs to the assertion of the claim set up in this bill.

The bill is dismissed.

(DISTRICT COURT.)

RICHARD W. KEYS ET AL. v. STEAMBOAT AMBASSADOR.

During a high stage of water in the Ohio river, a descending boat should keep near the middle of the river without any regard to the channel.

A descending boat on the Ohio river, two hundred yards from the Indiana shore, has no right to signal by one tap of the bell and attempt to take the starboard side of another boat near that shore.

The rule requiring the up-stream boat to give the first signal to indicate its choice of sides does not apply when there is eighteen feet of water above the bars.

Lincoln, Smith & Warnock, and S. J. Thompson, for libellants.

Mills & Hoadly, for respondents. }

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OPINION OF THE COURT:

This is a libel *in rem* against the steamboat Ambassador, prosecuted by Richard W. Keys, Lafayette Maltby, and Nathan Baker, owners of the steamboat Joseph Landis and the barge Blue Dick; and Keys, Maltby & Co., shippers and owners of merchandise on board the said steamboat and barge; and sundry companies who were insurers of portions of the cargo of the barge. The libellants claim damages for the loss of said barge, and for the loss of and injury to the cargo with which it was laden, resulting from a collision with the said steamboat Ambassador. They aver that the collision occurred solely through the fault of those having charge of the boat last named. The respondents insist that it happened wholly through the improper navigation of the Landis.

This case has been pending for several years; and there seems to have been no lack of diligence and industry on either side, in procuring testimony to sustain the theory which each party assumes. A great mass of evidence has been taken and submitted to the court. And to those familiar with controversies growing out of marine collisions, it will occasion no surprise to learn, that as to some of the material facts in question, there is a palpable and direct conflict in the evidence. As is usual in all such controversies, each party is anxious to evade censure and responsibility, and each strives with great zeal and pertinacity to prove a state of facts that will most favor their views and interests respectively. From this cause, the duty of a judge required to investigate and pass judicially on the facts involved is often painfully difficult and embarrassing. In the present case, such is the irreconcilable conflict in the testimony of the witnesses as to the course of navigation pursued by these boats, just prior to the collision, the precise point at which it occurred, and the facts immediately connected with it, that if there were no controlling fact of paramount significance, apart from and not resting on the sworn statements of the witnesses, there

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would be almost insuperable difficulty in reaching any conclusion. Having very carefully considered all the circumstances brought to the notice of the court by the testimony, I will state the result to which I have been led.

There are some facts in this case, either admitted by the parties, or indisputably proved, and about which there can be no controversy. The collision in question occurred between nine and ten o'clock, in the night of January 20, 1854, in that part of the Ohio river known as the Troy Reach, extending from Cannelton, on the Indiana side, and Hawesville, nearly opposite, on the Kentucky side, in a course nearly straight, to the town of Troy, between six and seven miles below. There was a high stage of water at the time, not less than eighteen feet on the shoalest bars along this beach, and it was rapidly rising. The width of the river was between seven and eight hundred yards from shore to shore, and there was sufficient depth of water to permit the safe navigation of either of the boats, without any reference to the channel or deepest portions of the river. The weather was cold, and the night somewhat dark, but not too dark for safe navigation. And the wind was blowing strongly, quartering across from the Kentucky shore.

The Landis had been built and was used exclusively for the transportation of freight.

At the time of the collision, this boat was on its way from New Orleans to Cincinnati, with two barges in tow, each one hundred and fifty feet in length; one called the Blue Dick, being on the larboard side—the other, the Black Nose, on the starboard. Each of the barges were made fast to the steamboat by three separate lines, and their bows were forward of the steamer's bow from thirty-five to forty feet. The boat and barges were carrying together about fourteen hundred tons. On the barge Blue Dick there was a cargo of about four hundred tons, consisting of molasses, sugar, scrap iron, glass, and railroad iron. Of the latter, there were between fourteen and fifteen hundred

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bars on the deck of the barge, arranged in three layers. The draught of the Landis was between eight and nine feet, and its rate of travel about five miles an hour.

The Ambassador was a freight and passenger boat on its way from Cincinnati to New Orleans, with a full cargo and a number of passengers. The boat had an empty barge in tow, on the larboard side, one hundred and fifty feet in length, with its bow about fifteen feet aft the bow of the boat. The draught of the Ambassador was seven and a half or eight feet, and its speed from eight to ten miles an hour.

Each of the boats had the complement of officers and hands usual in the navigation of the western rivers. There is nothing in the evidence materially impeaching the capacity of the master of either boat. The pilot of the Landis, on duty at the time of the collision, was John McFall, who, by the concurring testimony of the witnesses on either side, was a man of mature experience in the navigation of the Ohio and Mississippi, and with the highest reputation as a pilot of intelligence, prudence, and skill. There is evidence that when on shore, or not engaged in actual professional duties, he is addicted to the habit of intoxication; but when in charge of a boat is strictly temperate. In the trip of the Landis now in question, he had not used any intoxicating drink.

The pilot of the Ambassador, on duty at the time the collision happened, was Frank Litterell. He was a young man of limited experience, and without an established reputation as a pilot. He seems to have been employed on the Ambassador, in connection with his brother, an older man, and of greater experience, but the evidence is satisfactory that Litterell was reputed to be as skillful and competent as any man of his age and his experience in navigation.

There seems to be no reason to doubt that both boats were furnished with the signal lights required by law, and

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that they were burning, and in good order, when the boats came together.

From the general aspect of this collision, it would seem almost incredible that it should have occurred. Everything was favorable to the safe navigation of the boats, at the time, and under the circumstances referred to. And the conclusion is attained, without difficulty, that the occurrence could not have happened, except through some egregious blunder, or some gross disregard of the laws of navigation, on the part of one of these boats, or both. The facts wholly exclude the supposition that the collision, with its disastrous destruction of property, was the result of inevitable accident. It is clear there was great culpability somewhere; and the question to be solved is, on which of the boats rests the responsibility of the fault.

The libellants claim, and have proved by their witnesses, that finding it necessary, and intending to take in a supply of coal at Cannelton, a coaling station on the Indiana side of the river, the pilot of the Landis crossed over from the Kentucky shore, a mile or a mile and a half above Troy, and proceeded up within from forty to seventy-five yards of the Indiana shore for about three miles. In crossing, the boat quartered up-stream in the usual way; and while crossing and going up near shore, his view in front of the boat was at times intercepted by the steam and smoke, which were driven forward by the force of the wind. Neither the pilot nor the master, who was on watch at the time, had any knowledge of the approach of a descending boat till apprised of it by one tap of a bell. This was understood as an indication that the down boat would take the Indiana side in passing. When the signal was heard the boats were not more than one hundred or one hundred and fifty yards apart, and a collision was inevitable. The pilot of the Landis replied promptly to the signal by a single tap of his bell, expressing thereby his willingness that the down boat should go inside of the track of his boat if it were practicable. At the same time the helm of the Landis was put

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hard down, to turn the boat farther out into the river, with the hope that the violence of the expected collision might thereby be lessened; and with this view the pilot simultaneously gave the order for stopping and backing his boat. The headway of the Landis was entirely checked when the boats came together. The descending boat was the Ambassador. All the libellants' witnesses swear the Ambassador came quartering in toward the Indiana shore, and struck the starboard side of the larboard barge of the Landis, near its bow, with such force as to part all the lines by which it was held except that at its stern; and that the barge swung round with its bow toward the Indiana shore, and when nearly round and very soon after receiving the blow it turned over. The railroad iron on deck was thus thrown into the river, and the whole cargo left in the barge, submerged. The barge soon rose to the surface in a reversed position, and after hanging for about two minutes to the boat the line was cut and the barge floated away. It also appears, that immediately after the Landis barge was struck by the Ambassador the starboard barge of the latter boat came in contact with the Ambassador's barge, near its stern, injuring it to such an extent as to render it of no value.

This brief statement indicates the theory of the libellants in regard to the collision in question. They insist that, from the evidence, the Landis was near the Indiana shore, in the proper place of an up-going boat, and that the Ambassador, instead of descending the river near the middle, according to the usages of navigation, was within seventy-five yards of the Indiana shore; and that the collision being the result of this unskillful management of the Ambassador, that boat must be held responsible for the injury sustained by the libellants.

On the other hand, the respondents claim that the pilot of the Ambassador, after putting out from Hawesville, was right in shaping out or following the channel of the river; and that, pursuing this course of navigation, his boat was from two to three hundred yards from the Indiana shore,

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and pointing nearly straight down the river, when the collision took place. They say the Landis did not cross so near as a mile or a mile and a half above Troy, but ran up, on the Kentucky side, nearly opposite to Judge Huntington's and then attempted a crossing in front of the Ambassador, and in such attempt ran into that boat at a point some two or three hundred yards from the Indiana shore, and at least half a mile above Judge Huntington's house. The witnesses for the respondents sustain, by their testimony, this view of the facts.

It is obvious that the question of fault, as between these boats, depends greatly, if not wholly, on the precise locality of the collision. If, as claimed by the libellants, it occurred near the Indiana shore—at a distance not exceeding seventy-five yards from it—the conclusion would seem to be inevitable that the Ambassador was out of its proper course as a down-stream boat, and must be held answerable for all the consequences of this error in navigation. On the other hand, if that boat was descending, two hundred yards or more from the Indiana shore, and the collision occurred not less than the distance named from that shore, the inference would be strong that the Landis was out of place, and can have no claim to indemnity for the injury or loss resulting from the collision.

The foregoing statement presents briefly the conflicting theories of these parties. And if the decision of this controversy was wholly dependent on the weight to be given to the testimony of the witnesses on the opposite sides, there would probably be some doubt where the truth lay. Yet, I do not readily perceive on what grounds the testimony of the witnesses for the libellants, as to the course of the Landis after passing Troy, and the facts directly connected with the collision, can be invalidated. The master and pilot of the Landis, with five others who were on the boat, swear that it crossed from the Kentucky side a short distance above Troy, and proceeded up the Indiana shore and very near to it, the whole distance to the point of collision, some two or three

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hundred yards above Judge Huntington's house, and from forty to fifty yards from the Indiana shore.

These witnesses had the best possible opportunities of knowing the facts about which they testify. They were men familiar with the navigation of the river and not liable to be deceived as to distances and the course of navigation. It may also be well presumed, from their positions on the boat, that their attention would be especially directed to the circumstances which they relate. They could not be mistaken as to the place of the boat's crossing, nor as to the fact that it ran up very near the shore. If the witnesses, in their statements, have departed from the truth, they have done so willfully and corruptly, and are guilty of the most deliberate perjury. There is no room for the charitable supposition that they are under any mistake as to the facts about which they swear. It is scarcely necessary to say, in this connection, that these witnesses are sustained by the evidence of Martin. He says he was going down the road running on the river bank to Cannelton the evening of the collision, and when a mile and a quarter below Judge Huntington's he saw a boat with two barges coming up, about seventy-five yards from the Indiana shore. The witness did not then know what boat it was, but the facts stated by him coming subsequently to his knowledge, leave no room for a doubt that it was the Landis.

The respondents have offered the testimony of several witnesses to disprove the libellants' theory of the collision. Capt. McGowan, the master of the Ambassador, swears, that soon after leaving Hawesville, he went below, and had no intimation of the approach of the boat till he heard the tap of his pilot's bell. He went immediately on deck and there saw a boat—the Landis—quartering across toward the Indiana shore, and so near the Ambassador that he supposed there would be a collision. He states that the pilot of the Ambassador had stopped and backed, and the boat was nearly stationary, pointing straight down the river, when the Landis struck his boat and barge, nearly broadside. He

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also says that the collision took place two hundred and fifty or three hundred yards from the Indiana shore. Litterell, the pilot of the Ambassador, in his statement, not sworn to, but, by agreement of counsel, received as the *ex parte* deposition of the witness, says that after rounding out from Hawesville, he "shaped out the channel, and proceeded down about two hundred yards from the Indiana shore." He discovered the lights of a boat coming up on the Kentucky side, which proved to be the Landis. The Landis turned, and steered across from the Kentucky shore, pointing directly toward the Ambassador. The witness then tapped for the Indiana side, and this signal was immediately answered by one tap from the Landis, and the witness then gave his wheel a turn, to throw the boat more to the starboard. The Landis continued to approach, and fearing a collision, the Ambassador was stopped, and had no headway when the boats came together.

Without specially noticing their evidence, it may be remarked that other witnesses connected officially with the Ambassador concur in the statement that the Landis was crossing from the Kentucky shore, at the time of the collision; and, also, that the collision took place from two hundred to three hundred and fifty yards from the Indiana shore. It is also insisted, by the respondents, that this view is strongly sustained by persons on shore at the time, who noticed the course and navigation of the boats. The witness, George W. Hutchinson, swears, that, from Judge Huntington's house, and nearly opposite to it, he saw a boat with two barges, going up some fifty or eighty yards from the Kentucky shore, and another boat coming down same distance above, about two hundred yards from the Indiana shore. Shortly afterward there was a collision between the boats, as the witness supposes, nearly opposite Judge Huntington's house. He also states that the Ambassador landed about one hundred yards below, and the Landis some four hundred yards above the place of collision. The witness Brazee states, that he was in his house, near the bank of

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the river, and hearing a crash, looked out through a window, and saw the boats near together, more than two hundred yards from the Indiana shore, at a point something less than five hundred yards below. Mrs. Shoulders also saw the boats from her house when near together, two hundred or two hundred and fifty yards out from shore. She thinks the collision occurred some four hundred yards below Mr. Brazee's house.

Such are the more general aspects of the material facts in controversy, as presented respectively by the evidence for the libellants and for the respondents. It must be admitted, that as to the course and position of the boats immediately prior to, and at the time of the collision, as well as the subsequent occurrences, the testimony of the opposing parties is widely variant. That of the libellants, if reliable and credible, proves conclusively that the Landis crossed the river a short distance above Troy, and continued up the Indiana shore—from fifty to seventy-five yards from it—to the place of collision, and that as a necessary result the collision occurred near that shore.

On the other hand, if the respondents' witnesses are correct in their estimate of distances, and other matters whereof they testify, the Ambassador's line of navigation was from two hundred to three hundred and fifty yards from the Indiana shore. And again—if the evidence for the libellants is accredited, the collision occurred not exceeding two hundred yards above Judge Huntington's house; whereas, the testimony of respondents' witnesses would locate it nearly a half mile above that point. Under other circumstances, it would perhaps be necessary critically to analyze and compare this conflicting testimony with a view to ascertain in what way the scale of truth would predominate. In such an investigation, the weight of the evidence would not be determined so much by the number of witnesses testifying to any fact in controversy, as by the means and facilities they possessed for a correct observation and knowledge of the fact. And, however conflicting the facts stated by the witnesses may appear, my experience in the

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trial of cases of collision admonishes me not to be hasty in concluding that witnesses have willfully and corruptly falsified the truth. Under the influence of the excitement produced by a collision, the mind of a spectator, especially if inexperienced in navigation, is not in a state favorable for calm observation of the transaction in question. Witnesses state their impression of the facts as viewed by them from their own stand-point, and often without due knowledge of, or regard to the order of time in which events occurred. And as to distances, so often constituting an important element in these cases, very little consideration is due to the estimate of one not well versed in navigation. At night, and upon the water, nothing can be more deceptive than the distance of one object from another. Even pilots and others, after half a lifetime occupied in practical navigation, know by experience that impressions and opinions on this subject are often wide of the truth.

But, in the present case, I am relieved from the necessity of passing on the material issue presented, from an estimate of the probabilities of truth, based on evidence that is conflicting and uncertain. There is a fact in the case which appeals to the mind almost with the force of demonstration. I refer, of course, to the evidence of the place in the river at which the railroad iron, thrown from the deck of the barge when it capsized, was found. The fact is not disputed, that at a low-water stage of the Ohio river, in the month of September following the date of the collision, this iron was discovered, and the most of it reclaimed from the water at a point very nearly opposite Judge Huntington's house. In the language of a witness who saw it, the iron lay "pretty much in a pile, quartering out into and up the river some eighty or ninety feet, the lower part being within a few feet of the low-water shore."

It is, then, a fact, not depending on the speculations or uncertain memories of witnesses, that the barge of the Landis having the railroad iron on its deck was upset at the precise point where the iron was found in the river. It is also certain that at the stage of water at the time of the col-

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lision, the distance of that point from the shore did not exceed seventy-five yards. If, therefore, the barge, as proved by the witnesses for the libellants, capsized immediately after the collision, it follows that the boats came together within that distance of the Indiana shore. And assuming this to be the fact, the merits of this controversy depend wholly on the decision of the question whether the pilot of the Ambassador erred in running his boat so near to that shore. If the Landis was in its proper place, it was a great fault in the other boat to be there also. And if the collision was the result of this fault, there can be no difficulty in deciding where the responsibility rests.

On the part of the libellants, it is insisted that the proof is conclusive that after the larboard barge of the Landis was struck by the respondents' boat, and the lines were parted as already noticed, the barge swung round toward the Indiana shore, and upset, while swinging round. This is the statement of Washington, the master, McFall, the pilot, Dobson and Burns, first and second mates, McGroarty, the assistant engineer, and one of the deck-hands. These persons were all on watch when the collision happened and had the best means of knowing what occurred. One of these witnesses says that the time between the collision and the upsetting of the barge did not exceed two and a half minutes, while the others leave it to be inferred that it was less. They all concur in saying the boat was then very near the Indiana shore. Capt. Washington says that when the barge swung round, he was near the stern of his boat; and that the boat was so near the shore, he thought the barge would strike it in swinging round, and to prevent such a result ordered the pilot to go ahead, and put the boat further out from shore. Dobson, one of the mates, says he was on the barge when swinging round, and jumped from it to the boat, from the apprehension of danger in remaining longer on it. When the barge got nearly round, probably from the effect of the blow, aided by the tension of the stern-line, and the pressure of the water on its side, with

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the heavy weight of iron on deck, it suddenly turned over, and went under the water, but soon rose in a reversed position. The Landis then, for the purpose of effecting a landing, went ahead some distance, with the barge still in tow, when, by the captain's order, the line was cut, and the barge floated away. This is, in substance, the testimony of the libellants' witnesses as to the time and place of the capsizing of the barge. The facts, as stated by them, bear the impress of truth, and strongly negative any presumption that the occurrences, as sworn to, did not happen.

The witness Buckner, an intelligent lawyer from the South, who was a passenger on the Ambassador, and whose testimony has been taken by the respondents, corroborates the witnesses above referred to. After giving his impression of the position of the boats just after the collision, he says that when they were separated the bow of the Landis was turned across the river, and he then observed the barge float off from the side of the boat; the lines being tightened and raised out of the water—and the barge, when apparently some ten or twelve paces from the Landis, capsized and went down instantly.

The witness, Hutchinson, states that when he went out after hearing the crash of the collision, the barge was disconnected from the boat, and lying *bottom up*, very near the shore. It seems clear, that if the barge capsized at any considerable distance from the shore, and was there sent adrift by cutting the line by which it was attached to the boat, it is impossible to account for its being at or very near the shore, as stated by Hutchinson.

There is another fact of great significance, with reference to the upsetting of the barge, and leading to the conclusion that it occurred immediately after the collision. The fact referred to, is the position in which the railroad iron was found in the river. As before remarked, the evidence leaves no room for doubt that it lay quartering *up* and *into* the river. This strongly confirms the evidence of the libellants as to the capsizing of the barge. If, as they state, it turned

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over while swinging round from the boat, and just after it was struck by the Ambassador, the iron would be deposited in the bottom of the river, in the precise position described by the witnesses. Nor is it possible to account for its being so found, upon any other hypothesis than that which I have indicated. It is true the respondents have attempted to show that the upsetting of the barge did not take place for some time after the collision; and that after the collision the Landis went out further into the river, and in making its landing, with the barge in tow, it upset near the shore. It was undoubtedly important for the respondents to prove these facts, and thus to invalidate the evidence of the libellants sustaining their theory. But the proof, as I think, shows beyond controversy, that the barge did upset immediately after it was struck, while swinging toward the shore. And, if the respondents' witnesses are not mistaken in saying they saw the barge in tow of the Landis for some time after the collision, they must have noticed it when hanging to the boat after she upset, in the reversed position described by some of the witnesses for the libellants.

It would seem, then, that the evidence fully warrants the conclusion that this collision occurred some two hundred yards above Judge Huntington's house, and not exceeding seventy-five yards from the Indiana shore. It is most obvious that one of the boats was in fault, in being at the point where the collision happened; and the only remaining inquiry is, to which does the fault attach.

A large number of witnesses, experienced in the navigation of the Ohio river, have been examined as to the proper course of a down boat from Hawesville to Troy. There is some difference of opinion on this point, but the weight of evidence sustains the position that in a high stage of water a descending boat should keep near the middle of the river, without any regard to the channel. There can scarcely be a doubt that this course is not only in accordance with the usages of navigation, but sanctioned by reason and common sense. It has been before noticed that the evidence estab-

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lishes clearly that there was at least eighteen feet of water over all the bars along the Troy Reach. Yet the pilot of the Ambassador, according to his own statement, was shaping out, or following the channel, and he admits he was running within two hundred yards of the Indiana shore at the time of the collision. The river there is more than seven hundred yards wide; and keeping in the middle of the river, or near it, he would have been from three hundred to three hundred and fifty yards from either shore. It was, then, a great error in the pilot of the Ambassador to leave the middle region of the river, in pursuit of the windings of the channel. It was objectionable as involving unnecessary increase of the distance run, while it added to the chances of collision with ascending boats. And it follows that pursuing this erroneous course of navigation, even if it be conceded that his boat was not nearer than two hundred yards from the Indiana shore, he had no right to signal as he did, by one tap of his bell for that shore. If, as the libellants' witnesses prove, the Landis was near that shore when this signal was given, it was palpably wrong for the pilot of the Ambassador to attempt to take the starboard side. Or, if the truth is as stated by some of the officers on the latter boat, that the Landis was seen quartering across from the Kentucky side, it was the duty of the Ambassador to have passed to the left, and astern of the Landis. Upon either of these suppositions, there was fault in the navigation of the Ambassador, and to that fault the collision in question is clearly to be traced.

It is insisted, however, by the respondents, that the pilot of the Landis, by answering the Ambassador's signal with one tap of the bell, gave his assent to the claim of the latter boat to take the starboard side. It is true, beyond question, that the Landis gave this response to the signal from the other boat. But was it an error or a fault which shall make that boat liable, in whole or in part, for the consequences of the collision? According to the views

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indicated, the Ambassador was greatly in fault in attempting to follow the channel of the river, and thereby getting near the Indiana shore. The pilot of that boat had, therefore, no right to signal for the starboard side, nor was there any obligation on the ascending boat to respect it. The pilot of the Landis, it is true, did respond to the signal, by one tap of its bell, thereby indicating his willingness that the descending boat should go inside, if it were practicable. Under all the circumstances, I am not able to perceive there was any error in this course. It is conceded in the case, and the fact is proved by the witnesses for both parties, that when the signal was first given by the Ambassador, the boats were so near that a collision was inevitable. The pilot of that boat, pursuant to his signal, was quartering to the Indiana shore; and this accounts for the proximity of that boat to that shore at the time of the collision. The pilot of the Landis, seeing this, very judiciously decided to reply to the signal by one tap of the bell; not thereby admitting the Ambassador's course of navigation was right, nor with the expectation that the collision could thereby be avoided, but with the hope, from the angle at which the boats would come together, that the injury would be less serious. The helm of the Landis was therefore put hard up, the effect of which was to throw the head of the boat quartering to the Kentucky shore. It is clear this movement did not lead to the collision, nor does it imply fault on the part of the pilot of the Landis; especially when viewed in connection with the fact that the order had been promptly given and executed to stop and back the boat.

It is also insisted by the respondents that the pilot of the Landis violated a rule of navigation in not having first given the signal, by two taps of its bell, to indicate which side of the river he wished to take, and that his failure to do so was a palpable fault, sufficient to make the boat liable for all consequences. It is in proof, by the evidence of the pilot of the Landis and others on that boat, that

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the view from the pilot-house in front of the boat was seriously obstructed by the smoke and steam driven forward by the wind, and that he was thus hindered from seeing the descending boat till so near that a collision was certain. It is not necessary to pass on the sufficiency of this excuse. There is another ground on which it is clear the pilot of the Landis is not censurable in the particular referred to. The conclusion has been already stated, that the evidence proves that the Landis had chosen, and was running the Indiana shore in the proper place of an ascending boat when the collision occurred; also that the Ambassador had improperly left the middle of the river, and was, running near that shore, out of its proper place. The ascending boat would not, of course, be on the lookout for a descending boat in such a position, and is not chargeable with negligence in not sooner seeing it and giving the signal for the Indiana shore. The rule requiring the up-stream boat to give the first signal to indicate its choice of sides, does not apply when there is eighteen feet of water above all the bars. The rule must have a rational interpretation, and applies only to a stage of water so low as to make it necessary that both the ascending and descending boats should follow the channel of the river. It has no application when the up boat can safely keep the shore, and the down boat the middle of the river, irrespective of channels. It would be absurd to require the ascending boat, while going up in its proper place near the shore, without any purpose of changing its line of navigation, to announce, formally, by signal, its wish and intention to continue its course. The down boat, seeing the position of the up-stream boat, would conclude, without a signal to that effect, that the pilot intended keeping up the shore. The paramount law of navigation giving the ascending boat either shore, and assigning to the down boat the middle of the river, is not abrogated by a rule intended for a state of facts entirely different from those contemplated by the rule.

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But not deeming it necessary to pursue this investigation further, I will state as the result of the views indicated: 1. That there is no sufficient ground for a decree against the libellants for the injury sustained by the Ambassador in this collision, or for a division of the entire damages on the ground of mutual fault in the boats. 2. That the pilot of the Ambassador was in fault in not keeping his boat near the middle of the river, and in running too near the Indiana shore. 3. That, being thus out of place, he had no right to signal for the star-board side, but should have taken the larboard, whereby the danger of collision would have been avoided. 4. That the immediate cause of collision, and the consequent injury to the libellants, is attributable to this faulty navigation of the Ambassador; and that boat must be held liable for the loss and injury resulting from it.

The evidence affords the data for ascertaining the amount for which the decree is to be entered, on the basis stated, without a reference to a commissioner. A decree will be entered in accordance with these views for the amount of loss sustained by the libellants, as proved by the testimony.

(CIRCUIT COURT.)

JOHN C. MORRIS v. SILAS M. BARRETT AND JABEZ M. WATERS.

In the construction of a patent, the patentee is not to be confined to the summing-up or "claim," but the specification, the whole specification, and the drawings may be referred to, to ascertain the extent of the claim of the invention, or the proper meaning of expressions used in the "claim."

It is competent for the patentee to embrace two improvements on the same machine in the same patent, and if the defendant has used both or either of the improvements, there is infringement.

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M. claimed "the clamps, 6 6, to prevent end-expansion, and the levers, 7 7, working on fixed fulcrums," to prevent the wood from twisting. *Held*, that this was not a claim for the combination of clamps and levers, but for two distinct improvements in the art of bending wood.

A kind of evidence which is entitled to the highest credibility, is the machines themselves, as shown by the models, which, like figures, can not lie.

The law permits the opinion of men, called experts, to be given in evidence, to determine questions of mechanical difference; and when such men are qualified, and free from bias, their testimony is entitled to great respect.

If the same result is produced by the defendant as by the patentee, but by means substantially different, there is no infringement, for a patent is not granted for a mere result; but otherwise, if the defendant produces the result by contrivances substantially the same in principle.

THIS was an action on the case, tried before the Court and a jury, to recover damages for the alleged infringement of letters patent for an "improvement in wood-bending machines," granted to plaintiff March 11, 1856.

The machine consisted of a stationary form, around which timber was bent, by means of two levers, turning upon fixed fulcrums, and applied near the end of the timber. The timber to be bent was laid upon a metallic strap, having clamps or abutments attached to each end, which embraced the ends of the wood, and prevented any stretching of the fibers during the act of bending. These clamps were made to slide upon the levers as the wood was brought around the form. The claims of the patent were as follows:

"I claim the clamps, 6 6, to prevent end-expansion, and the levers, 7 7, working on fixed fulcrums, when in operation, all substantially as, and for the purposes, set forth in the foregoing specifications."

The defendants substituted radial arms with rollers to press upon the back of the wood, and used clamps which permitted a partial relaxation or stretching of the fibers at the commencement of the bending operation.

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G. M. Lee and S. S. Fisher, for plaintiff.

Bates & Scarborough, and *W. B. Caldwell*, for defendants.

CHARGE OF THE COURT :

The plaintiff's patent is for an improvement in wood-bending machines, minutely described in the patent and specifications. In the conclusion, or summing-up, he says: "I claim the clamps, 6 6, to prevent end-expansion, and the levers, 7 7, working on fixed fulcrums, when in operation, all substantially as, and for the purposes, set forth in the foregoing specifications." The *practical* purpose to be accomplished by these improvements he claims to be: 1. The clamps to prevent end-expansions; and 2. The levers working upon fixed fulcrums to prevent the wood from twisting. It was claimed in argument by defendants' counsel, that the plaintiff was confined, in construing his claim, to the summing-up; but the doctrine is well settled that the patent, the specifications, the whole specifications, and the drawings, may be referred to in ascertaining the extent of the patentee's claim; and while it is true that we are to look at the summing-up to discover what *parts* of the machine he claims to have invented, still, if anything is needed to enable us to determine the proper meaning of expressions used in the "claim," we must refer to the previous portion of the specifications for such explanations as may be necessary to understand the office and purpose of that which is claimed as new.

The plaintiff's claim is not for a combination but for two distinct improvements in the art of bending wood. It is, no doubt, competent for a patentee to embrace two improvements on the same machine in the same patent; and if, in the present case, the defendants have used both or either of the improvements of the plaintiff, they have infringed his patent.

On the subject of the identity of the two machines, it may be remarked that we are not concluded by their mere

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form or appearance. The question is, are they the same in substance? Is the machine used by the defendants a mechanical equivalent for that patented by the plaintiff? In applying these principles to the facts of this case, the jury will remember that there is a kind of evidence which is entitled to the highest credibility, and that is the machines themselves, as shown by the models, and which, like figures, can not lie. In addition, as many persons would be unable, from a want of previous knowledge or experience, to determine these questions of mechanical difference, the law permits the opinions of men called experts, to be given in evidence; and, when such men are qualified and free from bias, their testimony is entitled to great respect. The following is a brief summary of the testimony of this class of witnesses in the present case:

Three experts were examined on behalf of each party. Those for the plaintiff testified in the order named:

John Byrne says that he has been for several years engaged in the business of wood-bending. He describes the machines, and gives it as his opinion that they are substantially the same in principle.

Finley Latta has been for twenty years a machinist. He thinks the fulcrums and clamps are substantially the same in both; and that the joint in defendants' lever is a mechanical equivalent for the sliding of plaintiff's clamp.

Gardner Lathrop has devoted much attention to practical and theoretical mechanics. He thinks the machines are the same in principle; that the clamps are the same in both, and that the jointed lever is an equivalent for the sliding clamp.

On behalf of the defendants, the following experts testified:

Orville Mathers says that the two structures are different in principle; that the defendants have no fixed fulcrum, and that they do not prevent the expansions of the wood.

The plaintiff insists that the statements of this witness should be received with caution, because of his interest in

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the subject-matter, as he is the inventor or constructor of the machine used by defendants.

W. S. Rosecrans gives it as his opinion that the two machines are not the same in principle. He points out their difference of operation, and mentions the peculiarity of the defendants' machine, that it would bend non-elastic substances. He has had much experience as a teacher of mechanics, and testified with great intelligence.

George H. Knight is a patent agent, and is acquainted with mechanics. He says, upon an examination of the plaintiff's specifications, that the machines are not the same in principle; that the most palpable difference between them is the entire absence of fixed fulcrums in the defendants' machine. He thinks the action of the clamps is substantially the same in both—that both are intended to prevent end-expansion.

This is the substance of the testimony of the experts on both sides. The jury will give to it such weight in their judgment as it is entitled to, and if, from the evidence, they believe that the same result as that claimed by the plaintiff is produced by the defendants, by contrivances substantially different, then there is no infringement, for a patent is not granted for a mere result; but if they find that the defendants produce this result by contrivances substantially the same in principle as those used by the patentee, they will find a verdict for the plaintiff. The object of the action is not so much to obtain damages as to sustain the patent. There is nothing in the case to call for exemplary damages; but if the jury find the plaintiff entitled to a verdict, it would be competent for them to give him an amount that would compensate him for the actual damage sustained by reason of the infringement.

The jury found a verdict for the plaintiff, with \$125 damages.

Latta v. Shawk.

(CIRCUIT COURT.)

ALEXANDER B. LATTA v. ABEL SHAWK.

The defendant plead the general issue, and gave notice under section 15 of the act of July 4, 1836, attacking the novelty of plaintiff's patent. He also filed special pleas, averring prior use and invention, abandonment, etc. Upon motion the special pleas were stricken out.

A notice that a prior machine was used at "Cincinnati," "Covington," "Pittsburg," "Wayne county, Indiana," etc., is not sufficiently specific, and does not lay the foundation for the introduction of proof.

All exclusive rights in the nature of patents are created, and must be controlled by statutory provisions, and it must appear that all the essential requisites of the law have been complied with.

It is no defense, in an action for the infringement of a combination, to show that the separate elements are old; the proof must go to the novelty of the whole combination as a unit.

Experiments made by the patentee with an abandoned and unsuccessful machine, invented by another, are no evidence of the want of novelty in an invention subsequently reduced to practice.

It is familiar law that there is no infringement of a patent for a combination, unless the defendant uses all the parts of which that combination is composed. But there is another kind of combination to which this doctrine does not apply, and that is where the combination is of old and new parts of a machine. In such a case, the defendant infringes if he takes the new part only.

On the question of identity, the law regards substance and not form, and the real question is, whether the machine used by the defendants is in *principle* the same as that patented to the plaintiff.

By the term "principle" of a machine we understand its mode or manner of operation, and hence there may be two structures widely different in appearance or dimensions, which are yet identical in principle.

THIS was an action on the case, tried before the court and a jury, to recover damages for the infringement of letters patent for an "improvement in steam generators," granted to the plaintiff April 10, 1855. The invention consisted of a boiler formed of a coil, or series of continuous tubes into which the water was introduced by means of a hand pump, as soon as the fires were lighted, so that water

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might be thrown upon hot pipes, and be instantaneously converted into steam. To ascertain and regulate the quantity of water forced into the boiler, the feeding apparatus was provided with "an open water-box" to enable the engineer to see the water in its passage from the pump to the boiler. The defendant used the coiled tubular boiler and the hand pump, and introduced the water at substantially the same time as the plaintiff, but he used no "open water-box." There was a check valve in his supply pipe, by the movements of which the engineer could hear the water as it passed into the tubes, and could thus regulate its supply. The claims of Latta's patent were as follows:

"1. Combining a steam generator or boiler, consisting of a coil of tube, with a furnace, in such a manner that the flame, or products of combustion, shall come in immediate contact with said coil, when this coil is combined with a feed apparatus and gauges, which will enable the engineer to inspect constantly the supply of water, see that it is not interrupted, test its sufficiency, and regulate it at pleasure, according to the varying demands of the boiler, or close the dampers, if the feed should be interrupted, substantially as described.

"2. While confining the admission of water to the receiving end of a coiled tube boiler, limiting the quantity therein, and the supply thereof, to the quantity demanded for immediate conversion into steam, for the purpose of avoiding the weight of a large quantity of water; producing the steam promptly, saving fuel, and preventing the water from being thrown out of the tubes by the steam formed in the lower part thereof, substantially as described.

"8. Causing the discharging end of a coiled tube generator to communicate with and discharge itself into the water-jacket, while all other communication of said coil with said water-jacket is avoided, as described."

The defendant had given notice under section 15 of the act of July 4, 1836, attacking the novelty of the plaintiff's

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patent. He also filed seven special pleas averring prior invention, use, abandonment, etc. The plaintiff claimed that where notice was given under the general issue, special pleas could not be filed, and that in any event, such pleas must be filed thirty days before trial. He therefore moved to strike them out, referring to *Wilder v. Gaylor*, 1 Blatch. 597.

The court granted the motion, and the special pleas were stricken out.

At a later stage of the cause, the defendant attempted to offer proof, under his notice, of a prior use of the thing patented, at Cincinnati and other places. The defendant had given notice that he would prove that such prior use was known to Edward Shields, John Whetstone, etc., of Cincinnati, and that the machines, of which they had knowledge, were used at Cincinnati, Covington, Newport, Pittsburg, Philadelphia, and Wayne county, Indiana. The plaintiff objected to the proof, referring to *Silsby v. Foote*, 14 How. 218, on the ground that the notice was not sufficiently specific; and that it should have specified the street or factory where the structure which was claimed to be the same as that patented was used, or that the name of the owner or person using it should have been given; that "Cincinnati," "Pittsburg," etc., was not a sufficient compliance with section 15 of the act of July 4, 1836, which requires the defendant to state in his notice of special matter "the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used."

The court sustained the objection, and refused to receive any evidence of prior use by the persons, or at the place named in the notice.

A. Taft, A. F. Perry, G. M. Lee, and S. S. Fisher, for plaintiff.

C. D. Coffin, for defendant.

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CHARGE OF THE COURT :

I do not regard it as a matter of regret that so much time has been occupied in the investigation of this case. The character of the invention, the principles involved, and its importance to the parties demand that it should be thoroughly examined. My purpose is to state briefly the points of law, and leave you, as it is your province, to pass upon the facts. These matters of fact are neither numerous nor complicated, and I apprehend you will have no difficulty in applying the law to them. The validity of the patent as a patent for a combination, is not directly impeached by the defendant, but it is, nevertheless, the duty of the court to declare whether or not it is valid upon its face. All exclusive rights in the nature of patents are created, and must be controlled by statutory provisions, and, therefore, it must appear that all the essential requisites of the law have been complied with. In deciding this question, we must look to the patent, specification, and drawings, and these are to be examined, and construed in a liberal spirit. It is sometimes said that all patents are monopolies, grants of exclusive privileges which ought not to be maintained. I have only to remark that this view is not to be countenanced; that the patent should be construed liberally, and the patentee should be protected in all rights which fairly belong to him.

The patent in controversy, in this case, is not for a new machine, but for the improvement of an old one. The patentee claims that, by a combination of old machinery, he has succeeded in producing a new and useful result. This combination is undoubtedly patentable. As to its novelty, it is always presumed, from the patent itself, that the invention is new, and if a party sued for infringement would avail himself of the fact of a want of such novelty, it is incumbent upon him to prove it by giving a proper notice to the plaintiff to prevent surprise at the trial.

This defense is not relied upon in the present action, and I may here remark that if it were, it would be no defense, in an action for the infringement of a combination, to show

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that the separate elements are old ; the proof must go to the novelty of the whole combination as a unit. In the present case no such proof is offered. Nor is the utility of this invention controverted. Whatever else may be said of it, there seems no possibility that the usefulness of this improvement could have been successfully impeached. So far as it relates to the steam fire-engine, its greatest characteristic is that steam is applied in the least possible time to the extinguishment of fire. The patentee calls it an "Instantaneous Tubular Steam Generator," and its efficiency is well known and has been well tested. Whatever may be the result of the present action, it can in no way detract from the merit of Alexander B. Latta as an inventor, and there can be no doubt that in all time to come, this invention will secure for him the character of a public benefactor.

The question of infringement is the material issue in the present case. In this the burden of proof is on the plaintiff ; he is bound to show that his exclusive privilege has been invaded. It appears that in 1842, a patent was granted to a man named Lesh and others, for an improvement in a coiled tubular boiler. Experiments were tried by the patentee in the presence of Mr. Latta, and with his assistance, by which it was clearly proved that the boiler would not answer the purpose for which it was designed, and it was entirely abandoned. The knowledge which Latta thus obtained of the Lesh boiler is no evidence of a want of novelty in the invention for which he subsequently obtained a patent.

It is not unreasonable to suppose that, in the interval between 1842 and 1852, his mind was occupied with the subject of so perfecting this tubular boiler as to make it effective. In 1852 he filed his caveat—describing his ideas upon this point, so far as then matured. In 1853 he filed his first application for a patent for a number of improvements specified therein, among which were those now in controversy. The defendant also procured a patent for an improvement somewhat similar, in 1853. This is prior in date to Latta's

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patent, but it has no priority over it, for the invention dates from the filing of the caveat in 1852.

In the winter of 1854-55, the defendant, Abel Shawk, constructed an engine called "Young America," which, it is claimed, contained the improvements patented to Latta, and therefore infringed his patent. This engine was publicly exhibited at Columbus and other places, and was subsequently sold in Philadelphia for \$9,500.

I have already remarked that the plaintiff's patent is for a combination, and it is a familiar law that there is no infringement unless the defendant uses all the parts of which that combination is composed. There is another kind of combination to which this doctrine does not apply, and that is where the combination is of old and new parts of a machine. In such a case, the defendant infringes if he takes the new part only. But that is not this case. The defendant here insists that as the plaintiff has combined old things only, and as there are parts set forth in the specification which he does not use, he therefore does not infringe. It is also claimed that there are distinctions and substantial differences between the two, even in parts common to both. This question of the identity of the two machines is a question for the jury, and must turn upon the facts in evidence; though it is for the court to say what is identity in point of law. Upon the question of fact, the evidence usually consists of the models and the testimony of scientific and practical experts. It often happens that there is not that practical or scientific knowledge of mechanics in the court or jury, which will enable them to determine, without assistance, the question of identity. It is, therefore, the established practice, in cases of this kind, to call experts, who shall give their opinion of the identity of the structures, and this opinion, when free from bias or improper motive, is entitled to consideration.

On the question of identity, the law regards substance and not form, and the real question is, whether the machine used by the defendant is in *principle* the same as that pat-

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ented to the plaintiff. It would be a reproach to the law if a mere colorable change could deprive an inventor of the merit of his invention. By the term "principle of a machine," we understand its mode or manner of operation, and hence there may be two structures widely different in appearance or dimensions, and yet identically the same in principle.

This is the question presented to the jury in this case. There would seem to be some diversity of opinion among the witnesses examined. Three, called by the plaintiff, say that the principles of the two machines are identical, and eight or ten examined by the defendant regard them as entirely different.

I do not now propose a critical analysis of the specification or claims of the patent. They are all full and minute, and seem to have been carefully drawn. After describing his machine with great particularity, the patentee sums up by claiming such parts as he desires to be covered by his patent.

It is insisted, by the counsel of the plaintiff, that the claims are for three distinct and independent combinations, and while it is undoubtedly probable that this would be a fair construction, yet it is clear that the claim for what is called the "feed apparatus," is so blended in the first and second claims that it is a part of both. In this apparatus is clearly included an "open vessel," so as to enable the engineer to see the water going in, though the inventor adds that its place may be supplied by anything that will give motion to some mechanical contrivance. In other parts of the specification there are expressions showing clearly that the inventor attached great importance to an open water-box, and in his suggestion respecting a substitute, nothing specific or which supersedes the use of this vessel is mentioned. All of the experts say that this open vessel is necessary to the successful operation of the plaintiff's combination.

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It is in proof that the defendant has not used this water-box, but it is claimed that he uses a check-valve, which is a mechanical equivalent for it. This, then, is the point: Whether the omission of this thing by the defendant does or does not screen him from the charge of infringement? The jury have, doubtless, distinctly in their minds all the evidence, and will judge for themselves. I could have gone further into the consideration of the specification of the plaintiff, but after the full and able arguments of counsel on both sides, it seems unnecessary to do so. The jury can not mistake the question: What is to be the effect, on the merits of the controversy, of the omission of the element of the open water-box? Is it an essential element? The defendant can not evade this patent by not using a part proved not to be material to the successful working of the plaintiff's combination; and if the jury are satisfied that the water-vessel is not an essential or material element of the invention, and that the invention can be carried into effect without it as well as with it, then they will find a verdict for the plaintiff. If, on the other hand, they find that it is an essential part of the patented machine, and that no mechanical equivalent is used as a substitute for it, then they will find for the defendant.

If you find that the defendant has infringed, it is for you to say to what damages the plaintiff is entitled. It is a rule, well settled, that the damages, in such a case as the present, will be the amount of profits that the defendant has made. The case is committed to the jury.

The jury found a verdict for the plaintiff, assessing the damages at five dollars.

Logan v. Steamboat *Æolian*.

(DISTRICT COURT.)

LINUS LOGAN v. STEAMBOAT *ÆOLIAN*.

It is well settled that the master of a steamboat or vessel has no lien for wages.

It does not, however, impair the lien of a pilot for wages, that when the boat or vessel was in port the pilot was recognized and officiated as master.

The acceptance of a draft drawn by the clerk of a boat in payment of a claim importing a maritime lien, which draft was never paid, is not a waiver of such lien.

The clerk of a steamboat, who has an interest of one-half in the boat, has no lien for wages.

The lien of seamen for their wages, being a personal privilege for their protection, is not assignable; and the assignee buying these claims for wages on speculation can have no standing in a court of admiralty.

Where it appears from the evidence that the names of the seamen are used in the libel as claimants for wages, and that they had assigned their claims, and that the assignee was the sole party in interest, the libel in the names of the seamen will be dismissed.

After satisfying the allowed claims for wages out of the proceeds in the registry, the surplus, if any, will be applied *pro rata* to the payment of the other claimants.

Mills & Hoadly, for libellants.

Lincoln, Smith & Warnock, for interveners.

CHARGE OF THE COURT:

The original libel in this case was filed by Logan, asserting a claim against the steamer *Æolian* for wages as pilot. A number of other claimants have intervened for wages, supplies, advances, etc.

An interlocutory order has been made for the sale of the boat; a sale has been effected, and the proceeds are in the registry. The claims filed exceed the amount of these proceeds. A reference has been made to a commissioner to inquire into and report upon the nature of these claims;

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whether liens or not, and if liens in what rank or privilege they are to be viewed. The commissioner has reported on the matters referred to him, to which exceptions have been filed by different parties in interest. And these exceptions present the questions for the decision of the court.

The commissioner has reported the claim of the libellant (Logan) for wages as pilot, as a valid maritime lien. This is excepted to on the ground that Logan acted in the double capacity of master and pilot, and has no lien for services in either. As master, the law is well settled; he has no lien for wages. His contract with the owners is on their personal credit, and not on the credit of the boat. While the reason and justice of this principle has been doubted by some, it seems now to be the settled law in this country. But the claim of Logan is not for wages as master, but as pilot. It is clearly proved that his employment on the boat was as pilot, and not as master. He performed faithfully and satisfactorily the duties of pilot when the boat was running, and while in port acted as master. There was no one known or recognized as master—there was no one strictly authorized to act in that capacity—but when Logan was not at the wheel, by common consent, he acted as such. This does not deprive him of his lien for wages as pilot. His claim must, therefore, be allowed, to be satisfied *pro rata* with others having the same priority of lien.

The claim of Jenks, Winchell & Co., amounting to \$300, is disallowed by the master, on the ground that they dealt with the clerk of the boat on his individual credit, and not on the credit of the boat. The facts in relation to this claim are that this firm are warehouse keepers, and that merchandise had been left with them for shipment on this boat, on which there were charges to be paid before the property could be shipped. Jenks, Winchell & Co. were liable for these charges. They consented, at the request of the clerk, to ship the property on the boat, and to take the draft of the clerk, instead of the cash—a draft on a bank

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in Iowa. This draft was not paid, and their debt is still due.

There can be no question that the claim of these parties is substantially a claim for an advance by them, for the benefit of the boat, for which they have a lien, unless they have waived it by the acceptance of the draft.

The doctrine at common law is that a promissory note or draft, given for a pre-existing debt, does not extinguish the debt, and that the creditor, if the note or draft is not paid, may proceed on the original consideration. And this principle is recognized as applicable to maritime liens. The lien is not discharged by a draft or note for the claim, unless it clearly appears from the evidence that it was intended by the parties to have this effect. This principle was distinctly laid down by Judge Story, in the case of the *Barque Chusan*. 2 Story, 469.

There is no reason for the inference that Jenks, Winchell & Co. received the draft as a full discharge of their lien on the boat; especially in view of the fact that the clerk who made it was pecuniarily irresponsible, and wholly unable to pay the claim, in the event of the non-payment of the draft. I have, therefore, no hesitancy in holding there was no waiver of their lien, and that it is next in priority of lien to the claims for wages.

The report of the commissioner adverse to the claim of Alfred W. Hall for \$1,061.13, for wages as clerk of the boat, is affirmed. It is in evidence that in March, 1858, Hall purchased an interest of one-half in the boat, and that his claim for wages covers the time in which he was so interested. And it does not affect the question that he had executed a mortgage of his interest, which has never been foreclosed. He was the legal owner of an interest of one-half in the boat at the time this libel was filed. And as part owner, it is clear, he can have no lien for wages as clerk. It would be strange, indeed, that being a part owner, and as such liable *in personam* for the debts of the boat, he could have a lien, equal in priority to the just

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claims of others for wages earned. No authority has been cited sustaining such a doctrine, and it is presumed that none can be found. The claim of Hall is therefore rejected.

There are twelve seamen, who have joined in a claim for wages. It is in evidence, however, that they have sold and transferred their claims to Henry Wiche, who bought them on speculation at a heavy discount, and that this claim is prosecuted for his benefit, and that the seamen have no interest in it, although their names are used in this proceeding. It is clear that Wiche, the real party, can have no standing in a court of admiralty. A maritime lien for wages is in the nature of a personal privilege, for the protection of seamen, and is not assignable in the sense of transferring to an assignee the benefits of such personal privilege. In this view, the libel as to these seamen must be dismissed.

The report of the commissioner in favor of the interveners for supplies, repairs to the boat, and money advanced for expenses, is affirmed. If, after paying the claims allowed for wages in full, out of the fund in the registry, there is sufficient to pay in full the other allowed claims, the fund will be so applied. If there is not enough for this purpose, the residue will be applied *pro rata* to the other claimants.

(DISTRICT COURT.)

**JEFFERSON BLAGG ET AL. v. THE STEAMBOAT E. M. BICKNELL
AND CARGO.**

In a suit for salvage against a boat and cargo, a written instrument of abandonment signed by the officers of the boat, is admissible in evidence to prove the perilous situation of the vessel.

If a forfeiture of insurance results from a deviation in navigation made

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for the purpose of rendering a salvage service, it might be legitimately considered in fixing the amount of allowance to the salvors, but where no such consequence has followed, the mere possibility that it might have happened is a contingency too remote and speculative to enter into the computation.

Lincoln, Smith & Warnock, for libellants.

Fox & Fox, for respondents.

OPINION OF THE COURT :

This is a libel for salvage, prosecuted by the owners and navigators of the steamboat Ohio No. 2, against the steamboat E. M. Bicknell and its cargo.

The facts on which the libellants base their claim for salvage are, briefly, that the Bicknell, then being employed in navigating the Ohio river between the city of Cincinnati and the town of Parkersburg, the latter place being in the State of Virginia, on February 21, 1858, was proceeding up the river, laden with a cargo consisting of one hundred and thirty hogsheads of tobacco, three hundred sacks of wheat, two hundred and fifty barrels of flour, and some other articles of small value; and in attempting to pass up the channel, between Buffington's Island and the Ohio shore, grounded on a sand-bar, near the foot of the island; and while aground, the boat was turned by the force of the current, which was strong, nearly square across the channel, its bow being toward the Ohio shore. The weather was excessively cold, and the channel was covered with thick, heavy, floating ice, which was rapidly increasing, and which, while the Bicknell lay in the position before described, struck with great force against its upper side, and had gorged about the middle of the boat, and was thrown up nearly as high as the guard.

The officers and crew of the Bicknell had labored incessantly for about twenty-four hours to relieve the boat from its exposed situation, but wholly without success. In the evening of the next day, after the Bicknell had grounded,

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the Ohio No. 2, then running as a freight and passenger boat between Cincinnati and Marietta, in its downward trip, succeeded in passing down the channel between the stern of the Bicknell and the shore of the island, and at the request of the master of the latter boat, stopped and made fast his boat at the lower end of the island. The master of the Bicknell went on board the Ohio soon after, and requested the assistance of the latter boat in relieving his boat from its perilous situation. Capt. Blagg, the master of the Ohio, after consultation with the officers of his boat, refused to aid the Bicknell unless the boat and cargo were first formally abandoned to the officers and crew of the Ohio. This arrangement was assented to, and a written instrument of abandonment was signed by the master of the Bicknell, in which the other officers concurred in a separate writing. In pursuance of this arrangement, about eight or nine o'clock in the morning of the 22d of February, the Ohio was navigated with some difficulty up the channel to the Bicknell, and was made fast by lines to the stern of that boat and the shore of the island. In this situation, the officers and crew of the Ohio proceeded to lighten the Bicknell by the transfer of so much of its cargo as the Ohio could safely take, which the latter boat conveyed safely to, and landed on the shore at Ravenswood, some three or four miles below. The Ohio then returned to the Bicknell, and after taking a part of the remaining cargo succeeded in pulling the boat from the bar on which it was aground, towed it safely to Ravenswood, and replaced on it the part of the cargo which had been removed. The Ohio, with its officers and crew, was occupied in this service from eight or nine o'clock in the morning until ten or eleven in the evening, being in all about fourteen hours.

Without reference to the written abandonment, before noticed, and the protest signed by the officers of the Bicknell, the evidence leaves no room for a doubt that that boat and its cargo were in imminent peril when relieved

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by the libellants. It was so hard aground that there was no possibility of getting it afloat without taking out a large portion of its cargo. From its position, and the force with which the ice was striking it, the destruction of the boat and the loss of the cargo seemed inevitable.

But any possible doubt as to the peril of the boat and cargo is removed by the terms of the written instrument of abandonment, which is in evidence before the court. This paper, after describing the situation of the Bicknell, substantially, as already stated, and reciting that every effort had been made to relieve the boat, without success, sets forth, "that unless said boat is speedily relieved from her present perilous situation, that the ice will sink her, and thereby destroy both boat and cargo, and seeing no means of relief, I, for myself as captain and part owner of said steamboat, and as the agent of the other owners, underwriters, and whoever it may concern, hereby abandon to J. J. Blagg, and others, the said steamboat, E. M. Bicknell, and her cargo." At the same time the officers of the Bicknell signed a protest, which states, in nearly the same language contained in the abandonment, the extreme danger of the boat, as their reason for, and vindication of, the course they had adopted.

The service rendered by the libellants was a salvage service, beyond all question ; and the only inquiry in the case is, what amount of compensation shall be awarded to the salvors. On this subject there is not, and can not be, any fixed or invariable rule. Every case must necessarily depend on its peculiar circumstances. It has been recognized as a rule founded in sound policy, that salvage services should be so liberally rewarded as to afford encouragement to engage promptly, and even at great personal sacrifice and hazard, in saving property and life endangered by the perils of navigation. Courts of admiralty have, however, held it to be an indispensable element of a salvage service, that the danger to the property rescued, should have been actual and not speculative merely. This fact being satisfactorily

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established, there are other considerations which will affect and control the amount of the allowance. The value of the property saved, the promptness and energy with which the salvors have interposed, the hazard of life and property which they have encountered in the service, and the duration and arduousness of their labors, are proper elements in fixing the amount of remuneration.

In this case, the value of the Bicknell may be set down at \$10,000, and the cargo at about \$9,500. The libellants claim an allowance of twenty-five per cent. on these amounts, making \$4,875. I am unable to perceive, from any view I can take of the facts of this case, any just ground for this large compensation. There is certainly nothing in those facts justifying the conclusion that these services place the salvors in the highest position of merit. Their interposition did not result from any generous impulse or desire to do a good act to a fellow creature in distress, but from a cool calculation of the profit to inure to them as salvors. They refused their aid unless the periled boat and cargo were first abandoned to them, so as to place their claim for salvage on an indisputable footing. It is true, the abandonment was the voluntary act of the officers of the Bicknell, and by their own admissions, was the best that could be done under the circumstances. And while it is no answer to the claim that this was a salvage service, it may well be regarded as detracting from its merits as such, and is entitled to consideration in determining the amount of remuneration.

The case also lacks another element, which, when found in a salvage service, will always enhance the amount of the allowance. It is not claimed by the libellants—nor does the evidence warrant the conclusion—that the salvors in their interposition incurred any hazard of life, or other personal injury, except what ordinarily pertains to such service on the western waters. Nor was the labor performed peculiarly exhaustive or arduous. It consisted in the transfer of a part of the Bicknell cargo to the Ohio, placing it on the bank of

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the river at Ravenswood, and returning it again to the Bicknell. While this labor required a good measure of muscular effort, it certainly involved no extraordinary hardship or suffering. It was performed mostly by daylight, and the time occupied did not exceed fourteen hours.

But, as before stated, the service rendered by the libellants was a salvage service, and was important and valuable to the owners of the Bicknell and its cargo. Both the boat and cargo were in imminent danger. The evidence well justifies the conclusion, that but for the interposition of the libellants they would have been wholly destroyed or rendered nearly valueless. It is also clear of doubt that in the performance of this service the Ohio and its cargo were to some extent put in peril. The exact degree of this peril can not be readily determined from the evidence. But the position of the Ohio while taking on board a part of the Bicknell's cargo, and the force with which the ice was brought against it by the rapid current, leaves no room to question the fact that there was a hazard much greater in degree than that to which the Ohio would otherwise have been exposed. It is also in proof, that by reason of the intervention of the libellants, the Ohio was thrown out of place in the line of packets of which it was one, and thus subjected to expense and loss of time.

The considerations to which I have referred are entitled to weight in deciding upon the amount of compensation to be awarded. And I am not disposed to measure the sum to be allowed with great strictness. Although there is some evidence to show that one thousand dollars would amply remunerate the libellants for their services, the facts justify a more liberal allowance. I think that fifteen per cent. on \$19,500, the estimated value of the boat and cargo, will be a fair compensation to the libellants. I am the more inclined to adopt this rate from the fact that the owners of the cargo have paid the libellants, and they have accepted this percentage on the cargo. This, it is true, was in the nature of a compromise, and not conclusive on either

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party as fixing the rate of compensation. But it is an admission by the owners of the cargo that they deemed the libellants entitled to the percentage paid for the service rendered. Fifteen per cent. on the valuation of the boat and cargo amounts to \$2,925. This sum is, however, subject to a deduction of \$1,421, the amount paid and accepted as above stated, which leaves about \$1,500 to be paid by the owners of the boat. For this sum a decree will be entered.

In thus fixing the rate of compensation to these salvors, I have not overlooked the reason urged as a ground for a largely increased allowance, namely, that the service rendered involved the hazard of a forfeiture of the insurance effected on the steamboat Ohio, and its cargo. It is insisted that this was such a deviation from the ordinary course of navigation, as that the insurers were thereby released from all liability on their policies. And the principle seems well settled by the cases referred to, in regard at least to the navigation of the ocean, that a deviation for the mere purpose of saving property where human life is not involved, will forfeit the policy of insurance. To what extent this doctrine is applicable to insurances of boats on western rivers, it is not necessary in this case to inquire or decide. Here was no actual loss or injury to the libellants, from their intervention in behalf of the respondents, except the loss of time, and the expense incident to the detention of the Ohio. And I can see no principle on which the possible forfeiture of the insurance can form a distinct element in determining the value of the salvage service. If a forfeiture had resulted from the deviation, it might be legitimately considered in fixing the amount of allowance to the salvors; but where no such consequence has followed, the mere possibility that it might have happened, is a contingency too remote and speculative to enter into the computation.

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(CIRCUIT COURT.)

JAMES B. GREGORY v. HEWSON & HOLMES ET AL.

The Circuit Court of the United States, within the Southern District of Ohio, has adopted, as a rule of practice, the proceeding in aid of execution provided for by the code of Ohio.

Where an order was issued by the court, requiring a defendant to appear for an examination touching his property, and after the issuing of the same, but prior to his appearance, he executes a chattel mortgage to certain creditors upon a large amount of stocks and bonds, such order of examination was not so far *lis pendens* as to render the mortgage a nullity.

The principle that where, at the instance of a judgment creditor, a third person has been cited to answer as to property and effects held by him belonging to the judgment debtor, such notice operates as *lis pendens*, and that the party, from the time of the service of the notice, can make no disposition of the property or effects in his hands, does not apply to the case of a judgment debtor, as to whom there has been a mere order for his examination, without an order restraining him from disposing of his property.

Thompson & Nesmith, for plaintiffs.

OPINION OF THE COURT:

This is a proceeding under the code of Ohio in aid of execution, which has been adopted by this court as a rule of practice. The facts necessary to notice are, that on the 20th of September last, the plaintiff obtained a judgment in this court against the defendants for \$9,258.84, on which execution has issued, and which has been returned, no property to be found on which to levy. On the 27th of September, the plaintiff, on application to a judge of this court, procured an order for the examination of the defendants, touching his property, as authorized by the code. In this order there was a clause restraining the defendants from transferring or disposing of their property until the further order of the court. On the 28th of September, the defendants, by their counsel, made a motion for the rescission of the restraining clause in said order, on the ground

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that the plaintiff had made no showing authorizing such order. The judge thereupon suspended the operation of the restrictive clause till further cause was shown. On the 4th of October, a further affidavit having been filed, an order was made restraining the defendants from disposing of their property. On the same day, an examination of one of the defendants was had before a referee, which disclosed the fact that, on the 28th of September, defendants had executed a chattel mortgage to certain creditors, excluding the plaintiff Gregory, of a large amount of stocks, bonds, etc., being all in their possession or under their control at that time. The receiver appointed to take charge of the property and effects of defendants has reported that defendants were the owners of certain stocks, bonds, etc., amounting nominally to a large sum, of which he had demanded possession of defendants, but which they had refused to deliver, alleging that they had before mortgaged them to their creditors. The present motion is for an order on the mortgagee to deliver this property to the receiver. This motion involves the question of the validity of the chattel mortgage. The plaintiff insists that it is void, having been made after the institution of these proceedings, and therefore within the principle of a transfer *lis pendens*. From the foregoing statement of the facts, it appears that the chattel mortgage was executed on the 28th of September, the day after the order was made, suspending the operation of the restraining clause of the original order. There was, therefore, at the date of the mortgage, no operative order except that for the examination of the defendants by the referee. Was this order so far *lis pendens* as to render the mortgage a nullity? I am of the opinion that it can not be so regarded. There is no decision of the Ohio courts which gives this effect to a mere order for the examination of the judgment debtor. The Supreme Court of Ohio, in the case of the *Union Bank of Rochester v. Union Bank of Sandusky*, 6 Ohio St. 256, hold that where, at the instance of a judgment creditor, a third person had

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been cited to answer as to property and effects held by him belonging to the judgment debtor, the notice operated as *lis pendens*, and that the party, from the time of the service of the notice, could make no disposition of the property or effects in his hands. But clearly this principle does not apply to the case of a judgment debtor, as to whom there has been a mere order for his examination, without an order restraining him from disposing of his property. The rights of creditors, claiming under the mortgage, are directly involved in this question, and it would be clearly improper to make the order now requested, which would be decisive of the title of the mortgagees to the property embraced in the mortgage. It is too grave a question to be disposed of, in this summary way, without notice to the mortgagee, or giving him an opportunity to be heard in support of his title. There is obviously no necessity that the question should be thus disposed of. The plaintiff Gregory has a full opportunity, by a bill in chancery, in which all the persons interested must be made parties defendants, to assert his title to the property in question, while the creditors claiming under the mortgage will have their day in court, and the opportunity of sustaining the validity of the mortgage under which they claim.

The motion is therefore overruled.

(CIRCUIT COURT.)COLEMAN HAYS AND WILLIAM HAYS v. FREDERICK SULSOR,
WILLIAM TWAY ET AL.

It is a principle well settled and often recognized that, if the jury find that the defendant has used the invention itself or something substantially like it, he is estopped from denying its utility, for use implies utility.

To defeat a patent by showing a prior use of the invention, the statute has expressly provided that notice must be given of the place where and the parties by whom the thing relied on as a defense has been used. The provision is designed to give the patentee the benefit of an examination into the facts of the supposed prior use.

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A reference to a county in which, it is alleged, the prior use took place, is not sufficiently definite and explicit, as to place, to fill the requirements of the spirit of the act.

A prior use in a foreign land, does not invalidate a patent afterward taken out in this country, where the patentee, at the time of his application, supposed himself to be the first inventor, unless the prior invention has been patented or described in some printed public work.

The description, in the prior printed publication, should be, in some degree, in the nature of a specification, so far as to enable a mechanic skilled in the art, to construct the machine. It should not be vague reference to, or suggestions of the thing described.

A mere addition to a patented invention will not justify the use of the invention first patented.

THIS was an action on the case, tried before the court and a jury. The plaintiffs were assignees, for Paint township, Fayette county, Ohio, of letters patent for an "improvement in the mode of draining plows," granted to Abraham, Ezra, and Charles Marquiss and Charles Emerson, February 19, 1856, and brought suit to recover damages from the defendants, who were using upon their farms, in Paint township, a mole plow, purchased of Moses Bales, and manufactured under letters patent granted to him February 15, 1859.

The patented implement consisted of a piece of cast-iron about eighteen inches in length, sloping from a point upward and outward, until at the rear it was some six inches in height and width. The top projected in rear of the sides a few inches forming what was called a "tail," and shaped somewhat like a beaver's tail. The bottom was hollowed out, so that a cross-section of the mole would be nearly in the shape of a horse-shoe. This mole was attached to a long and sharp coulter, and was dragged along about three feet below the surface of the earth by powerful mechanism applied to the coulter. In its progress, it formed an arched tube or chamber, six inches in diameter not unlike the burrow of a mole. The claims of the patent were as follows:

"What we do claim as our invention and desire to secure

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by letters patent is the peculiar shape of the mole, which enables its forward movement to form a subterranean perforation, whose top and whose sides will be smoothly and densely compressed, and whose bottom will be left almost entirely uncompressed.

“We also claim the tail of a mole of such a shape and position that it will serve to close up the slit cut by the mole shank in forming a perforation, and also to serve to lead the mole upward to the surface of the ground, as soon as the beam is allowed to turn on its axis.”

G. M. Lee and S. S. Fisher, for plaintiffs.

R. M. Corwine and Charles Fox, for defendants.

CHARGE OF THE COURT:

This action is brought against four defendants for the infringement of a patent granted to Abraham, Ezra, and Charles Marquiss and Charles Emerson, February 19, 1856, for an “improvement in the mode of draining plows.” The title of the patentees has passed to the defendants by various assignments, which are in evidence, and which place their title beyond dispute. There is no controversy in the present case as to the sufficiency of the specifications. The testimony of Mr. Knight upon this point is that they are remarkably clear and exact. Not to occupy time with reading them, as they have been commented upon at length, I will call your attention to the claim or summing up, which is in these words:

“What we do claim as our invention and desire to secure by letters patent is the peculiar shape of the mole, which enables its forward movement to form a subterranean perforation, whose top and whose sides will be smoothly and densely compressed, and whose bottom will be left almost entirely uncompressed.

“We also claim the tail of the mole of such a shape and position that it will serve to close up the slit cut by the mole

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shank in forming a perforation, and also serve to lead the mole upward to the surface of the ground as soon as the beam is allowed to turn on its axis."

The patentees admit the invention and use of the drain plow previous to their own discovery, and claim the improvements specified. There are two of these improvements, for the infringement of either of which an action may be maintained.

To the claim of the plaintiffs the defendants interpose several defenses: First, that the alleged invention is of no utility; second, that it was previously described in printed publications; and third, that the defendants do not use the thing patented.

First, as to utility. There is no question but an invention must be of some utility; a patent can not be granted for a thing altogether frivolous; but the presumption on the face of the patent is that it is of some utility, for the applicant is obliged to swear that the invention is useful before the emanation of the patent.

The improvements claimed are: first, making the underside of a mole plow hollow, so that there shall be no pressure on the bottom; and second, the elongation of the hinder end, by which the cut made by the coulter is closed up. It is not claimed, as I understand it, that this cut will be closed all the way up to the surface, but only at the top of the drain itself. The plaintiffs' witnesses say that this plow makes a drain of proper size, having the top and sides compressed and leaving the bottom uncompressed. It is also claimed that perfect draining is accomplished at much less cost by the use of the instrument than by the means of draining before known, and in considering the question of utility, any saving in labor or expense is a proper subject for the consideration of the jury.

On the other side, it is said that the operation of this mole would be as complete if the hollow were filled, and also that the appendage does not close the slit. The jury are at liberty to use their own knowledge and to come to

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their own conclusion as to the validity of these objections. Upon this point, however, I am requested to charge, and I add, that it is a principle well settled and often recognized, that if the jury are satisfied that the defendants have used the invention itself or something substantially like it, they are estopped from denying its utility, for use implies utility, and it would be fair to presume that the party would not use it if he thought it of no utility.

Second, as to the novelty. The defense that an invention is wanting in novelty or originality, goes to the validity of the patent. But here, as in the case of utility, there is a presumption, arising from the patent itself, in favor of the novelty of the invention which it covers. This presumption the defendants may overcome by showing that the thing had been previously known. To do this, the statute has expressly provided that notice must be given of the place where, and the parties by whom the thing relied on as a defense had been used. This provision is designed to give the patentee the benefit of an examination into the facts of the supposed prior use. It has been ruled by the court that the notice given for this purpose in this case was defective in referring merely to the county in which the thing was in use. This reference, the court held, was not sufficiently definite and explicit as to the place, to fill the requirements of the spirit of the act. It may, therefore, be said that there is no evidence that will affect the novelty or originality of this improvement, which is derived from any use of the Clark county mole. Though, if such use had been proved, I hardly think it could stand in competition with the plaintiffs' machine. It is obviously of a very different shape, and one of the witnesses has said that it contains no element of the patented mole. Its prior use, or the knowledge of that use, could, therefore, hardly have been used in contravention of this invention.

But it is claimed that this invention was known in a foreign country. Such a use in a foreign land does not invalidate a patent afterward taken out in this country, where

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the patentee, at the time of his application, supposed himself to be the first inventor, unless the prior invention has been patented or described in some printed public work.

Two such public works are produced by these defendants, in which they say that this invention was described as long ago as 1851 and 1852. These books are "Morton's Encyclopedia of Agriculture," and "Stephens' Book of the Farm." The inquiry for the jury upon this point is, whether these books describe substantially the improvement described by the patentees. If so, then this defense goes to the validity of the patent. The description should also be, to some degree, in the nature of a specification, so far as to enable a mechanic skilled in the art to construct the machine; it should not be vague references to, or suggestions of, the thing described. The evidence of the experts in this case is that a skillful mechanic might construct the plow described by Stephens but not that referred to by Morton. Whatever be the accuracy of the description, the jury must be satisfied that the thing described is substantially the thing which would be made from the patent; for, if when made it is a different thing, it is not available to attack the novelty of the patented invention. It seems that these books do not provide for a cavity in the bottom of the mole, nor for any elongation, nor do they leave the bottom uncompressed, but provide for the water coming in from the top; the drain is also shallow and of less size—indeed Mr. Knight testifies that the thing described does not contain a single element of the patented article.

Third, as to infringement. If the jury find the patent in full force they will inquire whether the defendants have infringed. They have done so if they used either one of the patented improvements, or if they have made use of devices substantially the same, in which the same principles are brought into requisition, or, in other words, which are alike in their principle of operation. The patent is dated February, 1856. The patent of Moses Bales, under which defendants claim, is dated February, 1859. Is the

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plow made under the Bales patent substantially the same thing as that manufactured under the Marquiss patent? If so, it is an infringement. A mere addition to a patented invention will not justify the use of the invention first patented. Upon the question of infringement we are frequently obliged to depend in great measure upon the testimony of experts. Two of these have been examined in this case—Mr. Knight and Mr. Clifton. Both have stated that there is no substantial difference between the two moles, and they are not contradicted by any witness. If the jury are satisfied that they are substantially the same, they will have no difficulty in coming to a conclusion on this point.

The only remaining question is that of damages. When ascertainable, the defendants' profits are the proper rule of damages. In this case, it is also claimed that the license price and expenses of litigation should be considered. The law gives to the plaintiff his actual damages, and the amount of these is left to the discretion of the jury, under the circumstances of the case, looking to the compensation of the plaintiffs.

The jury found a verdict for the plaintiffs, with two hundred dollars damages.

(CIRCUIT COURT.)**JUNIUS JUDSON v. WILLIAM MOORE AND CHARLES F. WILSTACH.**

The description of the invention is required to be full, clear, and exact, that the public may be admonished of the precise claim, that it may not be ignorantly infringed; and that when the exclusive right shall have expired, the public may be at no loss to know what the nature of the invention is, so as to make it valuable and practical.

If, with the exercise of ordinary intelligence and skill, the invention could be constructed from the information given in the patent, there would be no doubt that the specification answered the requisites of the statute.

Reduced to its simplest elements, the improvement of Judson consists in making an opening or openings, controlled by the governor valves of

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steam engines, of gradually increasing capacity from the closed to the open position.

If A. had a distinct conception of the invention as patented to B., and communicated that knowledge to B., then, in a legal point of view, A. must be considered the first inventor.

Mere conversations about the practicability of an improvement, or suggestions as to the manner in which it might be carried out or accomplished, will not, of themselves, defeat the claims to originality of him who perfects the idea and secures a patent.

But any information to a patentee, sufficient to enable him to construct the thing itself, would destroy the originality of the invention. But that knowledge must be definite and tangible.

The evidence of the success and practical results of an invention goes more directly to the question of utility, but the jury may take it into consideration, in deciding on the novelty and originality of the invention.

THIS was an action on the case, tried before the court and a jury, to recover damages for the infringement of letters patent for "improved valves for governors," granted to Junius and Alfred Judson, November 5, 1850, and reissued to Junius Judson, January 10, 1854.

A portion of the specifications of the plaintiff's patent, together with the claims, was as follows:

"The object of our invention is to decrease the perturbation of steam engines caused by any change in the tension of the steam, or in the resistance or load, and the more effectually to check any undue increase or decrease in the motion of the engine, than can be effected by any plan known prior to our invention; and to this end the nature of our invention consists in making the steam passage or passages controlled by the governor valve or valves, so that the area or sum of the areas of the passage or passages shall gradually increase in capacity, not only by the amount of motion which uncovers it, but so that the amount of area opened by any given amount of motion shall be gradually greater toward the fully opened end, by means of which any tendency to increase the motion of the engine shall be checked by reducing the area of the steam passage to a greater extent than would be due to the amount of motion

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given to the valve, and the tendency to decrease the motion of the engine shall be checked by increasing the area of the steam passage to a greater extent than would be due to the motion of the valve alone, imparted by the governor under the change of speed of the engine.

“When the governor and valve work with effect, the pressure per square inch upon the piston is less than in the boiler, and reducing the load or resistance, reduces the pressure in the cylinder, producing less resistance to the passage of steam from the boiler to the cylinder; and the area of the valve-opening necessary to pass a given amount of power or steam, is much less with the light than with the heavy load, and an increased capacity of opening from the closed to the open position of the valve, more than is due to the opening motion of the valve, is necessary, so that equal amounts of resistance being successively added (as load to the engine), shall cause the valve to open successive and regularly increasing areas, until the valve is fully open, or the load complete.

“We do not wish to be understood as limiting our claim to the special form of valve-opening above described, as the form may be greatly varied, and yet act upon the principle herein specified as constituting the chief characteristic of our invention.

“Nor yet to limit ourselves to the form of the aperture or apertures, as the same end may be obtained on the same principle by the joint form of the opening or openings, and the valve governing the same.

“Nor do we wish to limit our invention to the making of such governor valve with the aperture or opening thereof on the principle herein specified throughout the whole range of motion, as in many instances it may be advantageously employed with the said principle acting only on a part of its range of motion, where engines are employed under such circumstances that they will not be exposed to serious perturbations above or below a certain range.

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“That, we do not wish to be understood as claiming broadly the making of the apertures of governor valves of capacities varying independently of the range of motion of the valve, as the well-known throttle valve, and valves, with circular apertures, have not a constant increase or decrease of capacity proportioned to the range of motion.

“But what we do claim as our invention, and desire to secure by letters patent, is making the opening or openings controlled by the governor valves of steam engines of gradually increasing capacity from the closed toward the open position, substantially in the manner and for the purpose specified.

“And we also claim interposing a spring between the valve-cover and the set-screw, or its equivalent, which determines or sets the position of the face of the valve to its seat, so that the tension of the said spring shall resist the pressure of the steam on the valve cover, and thereby produce an increased flow of steam to the cylinder, substantially as specified.

“And we also claim the employment of the valve-lever, adjustable to the stem of the valve, in combination with a fixed indicator, substantially as specified, for the purpose of setting the valve in any required position without opening the valve-box, as set forth.

“JUNIUS JUDSON,
“ALFRED JUDSON.”

The defendants were using a valve constructed by Cope & Hodgson, under letters patent granted to them.

In the specification of this patent, the following paragraph occurred :

“By providing in the box a cavity on each side of the seat, as shown at DD, figs. 1 and 3, the valve when open has its openings increased or diminished in a greater degree by a given movement than an ordinary throttle-valve, as the edges of the valve move directly away from the seat instead of parallel with it.”

The valves described by Judson and Cope & Hodgson

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differed greatly in form, and the controversy turned upon the employment of what was called the principle of graduation.

G. M. Lee and S. S. Fisher, for plaintiffs.

C. B. Collier and J. L. Miner, for defendants.

CHARGE OF THE COURT:

A patent was issued to Junius and Alfred Judson, jointly, in November, 1850. That patent, it would appear, has since been surrendered, and on January 10, 1854, was reissued to the plaintiff, Junius Judson, alone. It purports to be a patent for a new and improved valve for governors, and he brings his action for an alleged infringement of the exclusive right granted to him by this instrument. The defendants urge several grounds of defense:

First. That the patent is void from the uncertainty of its specification, in not describing the subject with sufficient perspicuity.

Second. The want of originality in the invention itself.

Third. That there is no utility in the patented improvement.

Fourth. That the defendants have not infringed the exclusive rights of the plaintiff, and, therefore, are not liable in this action.

As to the alleged uncertainty and insufficiency of the specification in this case, I have but a remark or two to make. This defense is based upon the ground that the description of the invention is so vague and indefinite that a mechanic could not construct the improvement from the specifications. The statute is very express on this subject. It requires that every inventor shall file, in the Patent Office, a clear statement of what his invention is, and the mode by which it is to be brought into practical operation. The statement is required to be clear, full, and exact in its terms, so that a mechanic skilled in that department shall be enabled to construct it, or, if it be a composition, to compound it, and that

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without resort to invention or experiment. The jury will see, by a moment's reflection, what the object and design of this requirement is. It is that the public may be admonished of precisely what the patentee claims, that it may not be ignorantly infringed. That is one purpose, and the second is, that when the exclusive right shall have expired, the public may be at no loss to know what the nature of the invention was, so as to make it valuable and practical.

This provision, as I before remarked, is *express*, and it must appear that it has been complied with, or the patent is rendered a nullity. This, however, is a question of fact for the jury. They are to pass upon the inquiry whether there is a sufficient specification or not. It is a question of evidence; and in the decision the jury have only to look at the evidence adduced. On the part of the plaintiff, several witnesses, termed experts, because supposed to be peculiarly qualified by their knowledge and practice of mechanics to give an opinion on this subject, have been examined. Mr. Knight, Mr. Gilbert, and Mr. Dunlap unite in believing that this specification is sufficiently definite for all practical purposes. On the other hand, there are witnesses who have expressed a contrary opinion. Mr. Whetstone, Mr. Reynolds, Mr. Davis, and Mr. Whitmore swear that the specifications are not sufficiently explicit and clear, that they do not give instructions and data from which a mechanic would know, with certainty, whether the improved valve would be successful under all circumstances. They do not say they *could not construct it*; but that they would be at a loss for any rule by which to apply the valve to any given sized engine, for any particular purpose, and under any circumstances. I do not propose to make any comments upon this part of the case; it is left to the jury. The statute must have a fair and reasonable construction; and if the jury believe, from the evidence before them, that this invention can be constructed by the exercise of skill and judgment on the part of a mechanic, they will come to the

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conclusion that these specifications are sufficient in the aspect of the case to which I now refer. It may be remarked, that in carrying out any invention the exercise of some skill and judgment, on the part of the mechanic called to construct it, will always be required. Something must necessarily be left to him. If with the exercise, therefore, of ordinary intelligence and skill, the jury believe that the invention could be constructed from the information given by the patent, there would be no doubt that the specifications answered the requisites of the statute.

The court has been requested to indicate an opinion upon the question, whether, taking the whole of these specifications, it appears that a patentable subject is set forth and described therein, for it is necessary that the subject-matter of the patent should be one within the contemplation of the patent laws, that is, one embraced within the scope and design of the statute itself.

I will remark here, that it had been my purpose to have entered into an extended analysis of this elaborate specification; but, upon reflection, and considering the time occupied in this case, I have concluded to bring my remarks on that point within a narrow compass.

Is this invention set forth so intelligibly as to enable the court to pronounce on the claim, and is there that discrimination which the law requires between what is old and what is new? This specification is of great length, very minute in its statements, and is accompanied with drawings. It is a familiar principle, that in construing it the drawings are to be regarded as part and parcel of it. In fact, the only objection to this specification is its great length and the multiplicity of words used in the statement. It is verbose and argumentative. The patentee, desirous to be understood, and to present his invention thoroughly and fully, has used more words than were really necessary. Still, if the object at which he aims can be clearly made out from what is stated, and it appears the thing itself is the subject of a patent, it will be the duty of the court to

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sustain the claim. There are three distinct improvements set forth in this specification ; but the only one now in controversy, and the only one used by the defendants, is that which refers to a governor valve to be used on a steam engine ; the other points may, therefore, be left out of the question, and the attention of the court directed to the form and structure of the valve itself. It may be remarked that the object is an improvement in the valve by which an increase or decrease in the motion of the engine is effected, without any disturbance, or as little as practicable, from the nature of things.

The patentees describe the mode of constructing their improvement, and the principle of its action. They then set forth a limitation to their claim, which is proper in all specifications where a patent is for an improvement on what was known before. This must be done to guard against the claiming of that which was previously known. They say they do not limit their invention to any particular form of valve, and refer to valves with circular apertures, as not having an increase or decrease of capacity proportioned to the range of motion. Finally, in the summing-up, they say, " what we claim as our invention, and desire to secure by letters patent, is making the opening or openings controlled by the governor valves of steam engines of gradually increasing capacity from the closed toward the open position, substantially in the manner, and for the purpose specified."

I think there can be no question, from the consideration of the entire specification, in connection with the drawings, that this plaintiff has described an invention that is patentable under our laws. The invention is obviously an improvement on the structures before known as governor valves, and is not a combination. In such a claim, it is not necessary that the patentee should describe with minuteness what was before known, or the particular subject of which the invention claims to be an improvement. Reduced to its simplest elements, the improvement is *making an opening*

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or openings, controlled by the governor valves of steam engines, of gradually increasing capacity, from the closed to the open position. Referring to the previous parts of the specification, the claim contemplates such an action as shall cause the valve to open in regularly increasing areas till it is *completely* open; but I can not gather that the openings contemplated by him, while they are gradual or regular, are necessarily in geometrical or arithmetical progression.

I shall not detain you with any attempt at an exposition of the character of this invention, as claimed by this plaintiff. I am not sure that, if I were to make the attempt, I should succeed in making it more clear to your minds than it now is. The properties of the invention have been so fully discussed, that you will be at no loss in comprehending what the plaintiff claims. It seems to the court that the improvement covered by patent is sufficiently set forth to enable the court to see that what is claimed is patentable. I see no foundation to support the idea that there is any want of distinctness between what he claims as his, and that which was before known; so that the patent is not objectionable on that ground. With regard to the construction of specifications, I may remark that it is a rule that they shall be construed in a liberal spirit, and that they shall receive an interpretation that will, if practicable, effect the end and object designed. This is fair. A defect should be clear and palpable, to justify the court in saying that the patent was a nullity. It is subject to scrutiny before it passes into the hand of the patentee. The whole claim of the inventor is subjected to an officer, who acts under oath, and who is usually a man well skilled in natural philosophy, and mechanical science generally, and who would not be justified in granting a patent to any person, unless, in his judgment, the specification was sufficiently clear. I am aware that he may make mistakes—that objection may be afterward made, and that it is the right of a party who has been sued, to avail himself of all the advantages that may arise from the failure on the part of the patentee to

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comply with the requisitions of the law. You will have the specifications, with the drawings, in your retirement, and may consider them minutely.

I pass to the consideration of the questions that belong exclusively to the jury.

First, as to the originality of this invention. There is no controversy in regard to the *principle* of law. It must appear, as the basis of the patentee's right, that his invention is new and original, for if not *his* invention, he never had a right to a patent, and the patent is clearly a nullity. This is the point made by defendants; it is strongly urged, and it is one well worthy of your attentive consideration. Before I call your attention to the evidence upon this point, I may notice another very familiar principle of law, which has been adverted to by counsel. That principle is, that the emanation of a patent in favor of an individual is *prima facie* evidence that there is some novelty and utility in the invention, for it is upon the strength of the patentee's oath, and the showing that there is something not only new, but useful, in the invention, that the commissioner is authorized to issue the patent. It is, therefore, a reasonable proposition that the granting of a patent affords *prima facie* evidence of the novelty as well as utility of the invention. Still, the defendant is not concluded by this; it is competent for him to show that the invention is not new, and that therefore the plaintiff had no right to the patent. On this point the statute had placed this guard: Wherever the defense is a want of novelty or originality, it is made the duty of the party sued to notify the plaintiff particularly of the circumstances under which the invention is known or used. He is to give a notice of thirty days prior to the trial, and state by whom and the place where the invention was previously known; and having conformed to the conditions of the statute, it is his right to impeach the novelty and originality of the invention. In the present case, the defendants have given notice of persons and places where it is

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alleged this improvement was known and used prior to the emanation of this patent.

I will call your attention to the different cases embraced under the notice of the defendants.

The first is the case of the alleged use or knowledge of this invention by H. M. Collier at Binghampton, in the State of New York. I have not had the opportunity of reading the deposition, though I have heard it read in the presence of the jury. It will be for the jury to say what facts are established by it. His statements are, in substance, that in 1847 he used a valve which embraced the principle of a gradual opening. He gives a description of the valve, and accompanies it with a drawing, which, he says, he made himself, some years ago.

He also states he used it as a governor valve for four or five years. He states, too, that he had a conversation with the patentee, at a time I do not recollect, in which Judson admitted that this valve was the same as his. There is one fact which, it is alleged, destroys the deposition of Collier. It is that the drawing does not, by admission of the counsel for the defendants, describe a practical and successful governor valve. It will be for the jury to determine how far that circumstance shall affect the evidence of Collier in regard to the valve to be used.

The next case is that of W. B. Hill, who states that in the year 1848 he put up a governor valve in a saw-mill in Michigan, which had the principle of a gradually increasing opening, like that of the patentee. He exhibits the diagram of the valve and governor which he has fully explained to the jury. He says the forms of the openings were different, but in principle they were the same. Next, J. B. Greeley states that in 1848 he and Judson got up a valve with a similar opening, in the office of Gardner & Co., in Cincinnati. He states that he suggested the valve, and that Judson said he had never seen anything like it before. Greeley says he left Cincinnati, and, returning some time after, the valve was gone, and Judson had left the city. Witness says

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the opening of the valve was substantially the same, but there might be some difference in the ratio in which it opened. He states, too, that he told Judson that the same result might be obtained by a triangular opening of the valve. Greeley undoubtedly represents himself as the inventor of the valve, and states that Judson told him he was going to Washington, and if the valve was patentable, he would assist him in getting a patent for it; and that if the valve did not succeed, an angular opening could be substituted for it. D. A. Powell has been examined also, and says he saw the valve at Gardner's, and heard a conversation, in which Judson said it was Greeley's invention, and that Greeley had got a good thing. He also says he heard Judson say that the valve worked well. This is the evidence in regard to Greeley's valve. It is asserted that the testimony of Greeley is impeached; that some time before, his deposition was taken in Iowa, and that there is a discrepancy between that deposition and his oral testimony. The jury will refer to that deposition and see how far it affects the credibility of the witness. If my recollection is right, I think he does not state in as strong terms, in his deposition as in his oral testimony, that he was the inventor.

Next comes N. G. Thom. He states that in 1846 or 1847, he built a locomotive, in which he put valves, the model of which he has exhibited to the jury. He states that it had no governor, but was regulated by the hand of the engineer; that it had a graduated opening, and in principle was the same as the Judson valve, and that it was intended to be used only on a railway locomotive.

I shall have occasion to refer to some points of law involved in this testimony, but I shall now pass on to the remaining evidence.

Next comes Mr. Latta and the Eunison valve. Mr. Latta states that he saw a valve in use at the marble works in Cincinnati, which he believes to be the same valve or similar to the one exhibited to the jury. I do not remember that he positively identified it as the same valve.

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Speaking of the Eunison valve, he says, it may be made to operate on the principle of a gradually increasing opening; but remarks that Judson has provided more fully for the regulation of the quantity of the steam, and that his valve shuts more closely. He says they both have the same principle of gradually opening, but with some difference in the ratio of increase. Several witnesses have been called, and have testified that, in their opinion, the valve is substantially like the plaintiff's in the principle of graduated openings. It is also claimed that this valve has a circular aperture, the invention of which is expressly disclaimed by Judson. If the jury are satisfied that it was different in structure and application from the valve patented by plaintiff, it does not prove that the invention was not original with this patentee. It is claimed by plaintiff's counsel that, in regard to the Eunison valve, some doubt is thrown upon the question of identity of the valve referred to in the evidence of Mr. Latta. He states the valve exhibited is the Eunison valve; but another valve has been presented, which, it is represented, had just been taken from the works at Coleman's, and which Coleman states is the one put up by Eunison in 1847 or 1848. It remains with the jury to determine who is mistaken in regard to the facts connected with this valve.

I will say here, gentlemen, in connection with all these valves that are embraced in the notice of the defendants, and about which testimony has been given with a view to impeach the originality of the Judson valve, that they are all to be decided upon the question of the identity of these valves (known and in use before the granting of this patent), with the Judson valve; and if the jury believe they are, or any one of them is, substantially the same as Judson's, it of course destroys the originality of his invention, and is an answer to his present claim.

I will remark, as to the Greeley valve, that the jury will first inquire whether he or Judson were the inventors of it;

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and I will state the law upon this point, as I understand it, in a very few words.

If the jury are satisfied that Greeley had a distinct conception of the improved valve as patented to Judson, and that he communicated that knowledge to Judson, then, in a legal point of view, he must be considered the inventor; or, if they believe he constructed a valve operating like the Judson valve before the date of this patent, it will be, of course, a good defense against the claims of the patentee. I will state the principle that must govern you, in these words. Mere conversations about the practicability of an improvement, or suggestions as to the manner in which it might be carried out or accomplished, will not of themselves defeat the claims to originality of him who perfects the idea and secures a patent. Neither will experiments defeat, even if known to the patentee, if it appear that *he* prosecuted such experiments to final success; but any information to a patentee, sufficient to enable him to construct the thing itself, would destroy the originality of the invention. But that knowledge must be definite and tangible; it should be sufficient of itself to enable the party to whom it was imparted to construct the improvement. This question, as to whether Greeley or Judson was the true and original inventor, is one of great importance in this trial. If the jury are satisfied that it was the invention of Greeley, and not of Judson, there will be no necessity to prosecute their inquiries further. They will scrutinize the evidence of Gilbert in relation to the trials and experiments of Judson, made at Rochester after his leaving Cincinnati; and with regard to the testimony of Powell, it may be regarded as somewhat weakened from the time that has elapsed since the conversation occurred. Such testimony is not of the most reliable character; there is strong danger that what actually did occur, or what was actually said, may fade away from the memory, and that a man may confuse words with thoughts, and yet honestly state his belief as to what actually did occur. If, however, the jury believe

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there is a substantial difference between the Greeley valve and that which is embraced in Judson's patent—if they believe Greeley's invention did not contemplate an increase of opening *through its whole range of motion*, it would necessarily follow that there was an essential difference in construction.

As for Thom's valve, it provided for certain openings, but not throughout the whole range of motion. It was designed to be used on railway locomotives, and it never has been used otherwise, and so far as we know, never has been patented to the inventor. This presents another question of identity between Thom's and Judson's valves.

The mere use of a mechanical structure for a different purpose is not of itself patentable, and if Judson had merely adopted Thom's valve and applied it to another purpose, without addition or improvement, he would not be entitled to a patent; that is, if he had merely applied it to other than railway purposes, he could not be entitled to a patent; but, if his valve be a different structure, applicable to *all* engines, and producing a new and useful result, it is a patentable subject; and if Judson has changed the structure of the Thom valve, and it has been applied to a new and useful purpose, the knowledge of the prior valve would not affect the originality of Judson's valve.

Thom's valve was to be regulated by hand, while that of Judson works with the governor. It will be for the jury to consider whether this does not constitute a sufficient difference between the valves to evidence the want of a substantial identity between them. I may remark that Mr. Knight states that the "Thom" valve would not be a practical structure in connection with a governor, because the friction caused by the pressure of the steam would be too great. Another point is that Thom's valve does not contemplate the gradual opening through its whole range of motion.

In passing upon this question, the jury will keep in view precisely what the thing is that is claimed by Judson, according to the specifications and drawings which accompany

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it. The principle of a gradual opening, through all its range of motion, would seem to be the distinct characteristic of the invention of Judson, and, if the jury believe the valves said to be identical do not embrace this feature, there would seem to be no ground for supposing that Judson's valve was not an original construction. If they think that to accomplish the purpose at which he aimed, and give, in connection with the governor, a steady motion to the engine, was an object of utility, and that it is not proved to have been accomplished before, it will be for the jury to consider whether that fact does not show the originality of this invention. The evidence of the success and practical results of the Judson invention goes more directly to the question of utility, but the jury may take it into consideration, in deciding on the novelty and originality of the invention. Practical results are more to be regarded than theory, and may be taken into consideration in a question of originality. Whatever may be the opinion of experts, if the proof be satisfactory that they are unlike any other known valves, in operation, the conclusion would be clear against their substantial identity.

On the subject of the practical operations of the Judson valve, the jury have a good deal of testimony, which I have no doubt they have kept in memory. It seems, however, that there is testimony that the principal object of Judson, that of preventing perturbations by means of the governor, is fully effected by the improvement, and so far as we have any information, his valves have effectually accomplished the purpose to which I have adverted. I have remarked already upon the question of utility, though I do not understand that feature of this improvement to be seriously controverted by counsel for the defendants. I suppose, that, upon the evidence before the jury, they would have no difficulty in believing the invention to be one of great utility.

The next question, and one of importance, is that of infringement. "Have these defendants used the invention

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patented to plaintiff," is the question for the consideration of the jury. The question to be decided is, whether the "Cope" valve is the same in principle and structure with that patented to the plaintiff. I will remark that it does not depend upon form or proportions so much as upon the principle of action, and the operation of the two things. It will be for the jury to say whether the Cope valve involves the principle of a graduated increase through its whole range of motion, and is substantially the same as that claimed by plaintiff. Several witnesses have stated that, in their judgment, the Cope valve and the Judson valve are the same; that they are substantially alike in their operation. It will be for the jury to say what weight shall be given to the judgment of these experts. They will also determine, by the examination of the models of these valves, and the testimony adduced upon the subject, whether there is that identity between the Judson valve and the valve used by the defendants, which will justify the jury in saying that the right of the plaintiff has been infringed. It is insisted, by counsel for defendants, that their valve acts on the principle of the Eunison valve, and is different from the Judson valve; that, unlike the Judson valve, it does not act on the principle of graduated openings through its whole range of motion; and is therefore essentially different from the plaintiff's improvement.

The identity of these valves is an important issue in the case, for, if the jury are satisfied that the Cope valve is different from the Judson valve, there is no infringement.

In regard to the question of damages, I will simply say that the whole subject is within the discretion of the jury. There are no data given in the present case by which damages can be estimated. The plaintiff is entitled to his actual damages, and it is for the jury to say what they shall be, if they believe him entitled to recover.

The jury found a verdict for plaintiff.

McNamara v. Gaylord.

(CIRCUIT COURT.)

THOMAS McNAMARA v. BENJAMIN B. GAYLORD ET AL.

A contract free from ambiguity in its terms must be viewed as the exponent of the intention of the parties to it, and can not be varied or contradicted by extrinsic evidence.

A partner can not, by an agreement to sell a part of his interest, compel his other partner to accept the vendee as a member of the firm.

Where one party to a contract agrees to do an act at a time specified, in consideration of which the other party is to do another act at the same time, neither party can sue for a violation of the agreement, or insist on its specific performance without showing an offer to comply with the agreement, or a sufficient excuse for not doing so.

Charles Fox, for complainant.

Taft & Perry, for defendants.

OPINION OF THE COURT:

This is a bill in equity, prosecuted by Thomas McNamara, a citizen of the State of Pennsylvania, against Benjamin B. Gaylord and Thomas G. Gaylord, surviving partners of Thomas G. Gaylord & Co., and Thomas G. Gaylord and E. H. Pendleton, administrators of Thomas G. Gaylord, a former partner in said firm, now deceased.

The bill avers, in substance, that in the spring of 1854, after some previous correspondence between the said Thomas G. Gaylord, deceased, and the plaintiff as to the purchase by the latter of an interest in the rolling mill and iron works at Portsmouth, in the State of Ohio, then owned and carried on by Thomas G. Gaylord & Co., on May 10, 1854, a written contract was entered into by which the said Thomas G. Gaylord, Sen., sold to the plaintiff an interest of one undivided eighth in the said mill and works for \$15,000, of which \$5,000 was to be paid on the 1st of July or October then next, and \$2,500 annually thereafter with

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interest till the whole was paid; and it was also agreed that the plaintiff should take charge of the manufacturing department of the establishment, as manager, at a salary of \$1,000 per annum.

The plaintiff further avers, that on October 1, 1854, he took possession as a partner and manager, and that he continued as manager until October 1, 1855, and that at that time the profits for the year exceeded \$70,000; that in consequence of his objections to certain improvements and additions to the works contemplated by the other parties, from October 1, 1855, he ceased to be the manager and took the place of a shipping clerk, and so continued till September 3, 1856, when he was notified that as he had not fulfilled his contract his connection with the concern must cease; that he left on said 3d of September, at which time the works were stopped to make repairs and improvements. He also avers, that from October 1, 1855, to the date of the stoppage of the works, the profits were \$38,664, making an aggregate of profits from October 1, 1854, of upward of \$110,000, of which he claims one-eighth part, after deducting payments received by him.

The plaintiff also alleges that he proposed to and requested of Gaylord, on October 1, 1855, to settle with him, and that the \$5,000, which he had agreed to pay, should be retained out of the profits to which he was entitled, which was refused; and he avers that he has been unable to procure a settlement, etc., and he prays for a dissolution of the partnership, an account of profits, and a decree for one-eighth part of such profits.

The exhibits and evidence show that on and prior to October 1, 1854, Thomas G. Gaylord, Sen., was the owner of an interest of three-fourths in the mill and works, and that Benjamin B. Gaylord owned the other fourth; and that, in the spring of 1855, Thomas G. Gaylord, Sen., sold and transferred to his son, Thomas G. Gaylord, one-half of his interest, to take effect from October 1, 1854, from which

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date he was therefore a partner. The entire interest was then estimated at \$120,000.

Benjamin B. Gaylord and Thomas G. Gaylord have filed their answers, as surviving partners; and the administrators of Thomas G. Gaylord, deceased, have also answered. In their answers the administrators refer to and adopt the answer of Thomas G. Gaylord, Sen., filed by him in a suit brought by McNamara in the Court of Common Pleas of Scioto county, Ohio, which involved essentially the matters now in controversy. It is not necessary to notice in detail the numerous allegations of these answers. They deny explicitly that the plaintiff had an interest in the iron works, as a partner, and aver that he has no claim for an account of profits. They insist that the rights of the parties must be settled by the terms of the written contract of May 10, 1854; that the plaintiff failed to comply with his obligation to pay \$5,000 on October 1, 1854, which was the condition on which the interest of one-eighth was to vest in him; that he has not paid or offered to pay said sum, nor has he in any way been released from such payment; that he was at no time accepted or treated as a partner, and had no connection with the concern except as manager under the contract, for the first year after its date, and subsequently as a shipping clerk, for which he has been fully paid according to the terms of the contract.

There are also averments in the answers to the effect that the plaintiff was incompetent to the discharge of the duties of a manager; and, also, that the contract of May 10, 1854, was entered into by reason of the false and deceptive representations of the plaintiff as to his ability to pay the \$5,000, and the other payments specified in the contract, and that he then was and for some time before had been insolvent and wholly unable to meet any pecuniary liability, and therefore that said contract was fraudulent and void.

I do not propose to examine these points in the defense, as there are other grounds which I deem decisive of the merits of this case.

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I will now notice the written contract between the plaintiff and Thomas G. Gaylord, premising that it is set forth in the plaintiff's bill in connection with many collateral facts which seem to have no bearing on the merits of this controversy. It is, however, referred to in the bill, as the basis of the plaintiff's claim, as a partner, and his right to an account for profits. The contract is perspicuous and free from ambiguity in its terms, and must be viewed as the exponent of the intention of the parties to it. And as it can not be varied or contradicted by extrinsic evidence, there would seem to be no occasion to notice in this place the correspondence between the parties which preceded its execution. Such a correspondence had taken place, and Gaylord, in one of his letters, stated that the arrangement could not be consummated without the presence of the plaintiff at Portsmouth. He came out, and after an examination of the works, the parties signed the contract. Without reciting it at length, I will state its essential provisions. Its date is May 10, 1854. Gaylord agreed to sell the plaintiff an undivided eighth of the rolling mill and iron works, including everything pertaining to them, except the land, and to give possession the 1st of July or October then next. He also obligated himself to keep a capital of \$60,000 in the concern so long as it might be needed, on one-eighth of which the plaintiff was to pay interest and to have one-eighth of the profits, and to share in the same proportion in the losses. The plaintiff was to take charge of the works and manage and superintend the manufacture of iron and nails, for which he was to receive an annual salary of \$1,000. He agreed to pay for the interest of one-eighth the sum of \$15,000, of which \$5,000 was to be paid on the said 1st of July or October, and the rest in annual payments of \$2,500, until the whole was paid.

The first remark in relation to this contract is, that it is not by its terms, and does not purport to be, an agreement for a partnership. It is clear that Thomas G. Gaylord could not, by an agreement to sell a part of his interest,

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compel the other partners to accept the vendee as a member of the firm. It was doubtless intended to be preliminary to such an arrangement, but, *per se*, can have no such effect. Two objects were within the contemplation of the parties to the contract. It was, in the first place, a conditional sale by Gaylord of an interest of one-eighth in the iron works; and, in the second place, it provided for the employment of the plaintiff as a manager or superintendent at a fixed salary, payable without regard to profit or loss.

Under this contract the plaintiff entered on the performance of his duties as manager and superintendent of the manufacturing department on October 1, 1854. It would seem that in the copy of the contract retained by Gaylord, the 1st day of July is named as the time when the plaintiff was to commence as manager, and when the advance payment of \$5,000 was to be made; while in the other copy, as already noticed, it is stated in the alternative the 1st of July or October. This difference in the contract is not material, and can not affect the decision of any of the questions arising in this case. As before noticed, the plaintiff commenced his service on the 1st of October. He continued in that capacity until October 1, 1855. By an arrangement then made, he was transferred to, and accepted, the post of shipping clerk, which he held until September 3, 1856, when his connection with the concern finally ceased.

Without noticing the numerous facts brought into this case by the pleadings, exhibits, and evidence, it seems to the court it may be disposed of by ascertaining what are the legal obligations of the parties under the contract in question, and whether the plaintiff has complied with it, in the sense of giving him a right to insist on its strict execution by the other party, and to claim its benefits as if complied with on his part.

The terms of the contract have been already stated. As the consideration of the sale by Gaylord of the interest of one-eighth in the iron works, the plaintiff agreed to

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pay \$15,000, of which \$5,000 was to be paid October 1, 1854, and the balance in annual installments of \$2,500. There is no pretense that the first payment was made on the day named in the contract, or at any time since, or that there has been at any time an offer to pay by the plaintiff, except by a proposition that the profits of the first year should be appropriated as a payment. Now, if this contract had provided only for the payment of the \$5,000, without any reference to subsequent payments, I suppose it to be clear the payment of the money, and the transfer of the one-eighth interest, must be regarded as concurrent acts, and that until there was a performance or an offer to perform by one party, the other was under no legal obligation to perform his part of the contract. Where the agreement is to do an act at a time specified, in consideration of which the other party is to do another act at the same time, the party in default can not sue for a violation of the agreement, or insist on its specific performance without showing an offer to comply, or a sufficient excuse for not doing so. By the contract in question the obligation of the plaintiff is not limited to the payment of the \$5,000 on October 1, 1854. He was bound to make four other payments of \$2,500 each to complete the purchase of the one-eighth interest in the iron works. The contract does not require the vendor to convey to the plaintiff the interest of one-eighth on the payment of the \$5,000 in advance; and, by fair legal implication, he was under no obligation to make or tender a conveyance till the whole sum of \$15,000 was paid or tendered. This contract admits of no other construction than that now indicated. And in this view there can be no ground for the claim asserted by the plaintiff, that Gaylord was bound to tender a deed for the one-eighth interest in the iron works on the day named in the contract for the advance payment of \$5,000. It is clear, then, that the plaintiff has no ground for the claim that under the contract he is to be regarded as a partner, and entitled to an account for profits. But it is insisted that, irrespective of

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the contract, the plaintiff has proved facts entitling him in equity to a share of the profits, on the ground that Thomas G. Gaylord, Sen., has waived the performance of the stipulation requiring payment of the purchase money, and that his acts, and the acts of the other members of the firm of Gaylord & Co., show that the plaintiff was recognized and accepted as a partner from October 1, 1854. If this position is sustained by the evidence, it is within the competency of this court, as a court of equity, and it would certainly be its duty, to give the plaintiff the relief sought for by holding him to be a partner, and decreeing a participation in the profits of the firm. I have examined carefully the evidence with a view to this aspect of the case, and without attempting a critical analysis of the facts, will state the conclusions to which I have arrived.

As to the waiver of the first payment required by the contract, there is nothing in the evidence by which it can be established by fair implication. On the other hand, there are several facts and considerations that negative the presumption of such a waiver. That the provision requiring the advance payment was made a part of the contract is a strong presumptive proof that Gaylord viewed it as an essential condition, and expected it would be complied with. There is no reason, from the nature of the transaction, to infer that he was indifferent on this subject. And the correspondence between Gaylord and the plaintiff, subsequently to the date of the contract, so far from showing a purpose or consent to dispense with the payment of the \$5,000, proves that it was always insisted on, and referred to, as a condition on which alone the plaintiff could be let into the concern as a partner. It is true, as the evidence conclusively shows, that before and at the date of the contract Gaylord was mistaken as to the pecuniary ability of the plaintiff to make this payment. He had reason to conclude, from his representations on the subject, that the plaintiff had means from which to raise the amount agreed to be paid; and, when he ascertained his inability to do so, he

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could at once have rescinded the contract. Gaylord did not pursue this cause, but indulged him by an extension of the time of payment, with the expectation that he would be able to procure the money needed. But this indulgence affords no reason for the inference, that he intended to release him from the obligation of his contract, especially as other facts expressly negative any such intention. But upon this point, it is sufficient to remark that at least for the first year of his connection with the iron works, the plaintiff did not pretend to claim an interest in them as a partner, without the payment of the five thousand dollars. That he so regarded the contract appears clearly from the fact, that during that year, as appears from his letters, he was making efforts to raise the money in Pennsylvania. And in one of his letters to Gaylord, he states, in substance, that he did not ask or expect a transfer of the one-eighth interest until the first payment was made. As a last alternative, he proposed that Gaylord & Co. should receive the remnant of a stock of dry goods, in part payment of the sum due. This was agreed to, on the condition that the goods were suitable for their store at Portsmouth. Upon examination, they were found unsuitable for that purpose, and the negotiation therefore failed. And on this subject it is proper to state, that the plaintiff in his bill avers that in October, 1855, Gaylord claimed that the first payment was due and unpaid, and that unless it was paid the contract would be void, and that plaintiff then proposed that the \$5,000 should be credited to him from the profits of the preceding year, which was declined.

But it is insisted by counsel that, conceding the plaintiff was bound to make the first payment, under the contract, on October 1, 1854, and that he has failed to do so, if the evidence shows that he was accepted and treated as a partner, the members of the firm of Gaylord & Co. are estopped from denying the partnership, and are liable to account to the plaintiff for one-eighth of the profits accruing while he was so connected with them.

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To appreciate properly the force of this position, it is necessary again to recur to the contract between Gaylord and the plaintiff, and the relation in which the parties stood to each other. Now, if the contract had been merely for the sale of a part of Gaylord's interest in the iron works, without providing for the employment of the plaintiff, as a manager, and he had been permitted to participate in the business of the firm without objection by the old partners, and without insisting on the payment of the purchase money required by the contract, there would be a plausible ground for the claim that these acts were a waiver of the contract, and a virtual recognition of the right of the purchaser as a partner. There are a class of cases in which this principle has been properly applied and enforced; but its application to this case is not perceived. The contract in question provided for the sale of an interest in the iron works to the plaintiff, and also for his employment as a manager. The two objects are divisible; and it is necessary to a right understanding of the intention of the parties that they should be separated. They have no necessary connection with each other. There may have been a failure on the part of the purchaser to comply with his contract, affording a good ground for its rescission, and it may have been in fact rescinded, and yet as to the employment of the plaintiff as a manager, it may have been in full force. There is reason to suppose this state of things was in the contemplation of these parties, in entering into this contract. Gaylord was desirous of securing the services of the plaintiff as a manager, under a belief that he would faithfully and skillfully discharge the duties of the station, and thus promote the interests of the company. He therefore agreed to give him a fair salary, to be paid without regard to the success of the iron works, while he superintended them. In addition to this, he was willing to sell him an eighth interest, at the price and on the condition stated in the contract. The arrangement was obviously a desirable one for the plaintiff, as it secured to him

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the means of livelihood, beyond all contingencies, with a chance of being interested in the firm on payment of the purchase money. If he failed in making the payments, and thereby forfeited his rights under the contract of sale, he would still occupy his place as manager, and receive his compensation as such.

This view throws light on the true construction of the contract between these parties, and their intention in making it. It also assists in a proper understanding of those acts, which, it is claimed by the plaintiff, are equivalent to a waiver of parts of the contract, and his recognition and acceptance as a partner. It shows, conclusively, that the possession of the plaintiff, so far as he had any, and his participation and agency in the business of the company, did not result from his purchase of an interest in the works, but from the position he occupied under the other branch of the contract, as the manager of the manufacturing department. And hence, the inference is not admissible, that his continuance in the employment of the company, after the failure to make the payment required, and his acts as manager, are evidence of the intention of the other parties to dispense with the obligations of the contract, or that he was accepted as a partner.

But, it is contended by the plaintiff's counsel, that there is affirmative proof that McNamara was treated as a partner during the first year of his connection with the iron works. This is apparent, it is insisted, from the correspondence between him and Gaylord, Sen., subsequent to the date of the contract, and from the verbal statements and admissions of Benjamin B. Gaylord. From a careful examination of the elder Gaylord's letters, I have failed to notice anything that can be fairly construed into an admission that the plaintiff was a partner. On the contrary, he often refers to the contract, and its requirement to pay the \$5,000 before the plaintiff can have an interest in the concern. And there are no expressions in the letters from which the inference can be drawn that Gaylord regarded

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the plaintiff in any other light than a manager. His language is that of an owner to his employe; though he obviously, for a time, contemplated and expected that the plaintiff would make the payment required by the contract, and thus entitle himself to an interest in the iron works. But what seems conclusive on this point is the fact, that at least for the first year there was no semblance of a claim by the plaintiff that he was a partner. In one of his letters, before referred to, there is an explicit disclaim of any right as a partner, or to a transfer of the one-eighth interest, until the first payment was made.

Nor does the evidence of the acts or declarations of Benjamin B. Gaylord prove the recognition of the plaintiff as a partner. It is true that on several occasions he stated the fact that the plaintiff had purchased an interest in the establishment; and two witnesses testify that after the plaintiff became connected with it, Gaylord introduced him as a partner. It is obvious, however, when this evidence is taken in connection with other facts, that he had reference to the contract between the plaintiff and Thomas G. Gaylord, Sen., and to the expectation that the contract would be consummated, and that the partnership would thus take place. There can be no question that for the first year after the plaintiff began his service as a manager, the Gaylords supposed he was acting in good faith, and had the intention and the ability to comply with his agreement; and their conduct was consistent with this supposition.

It is insisted, also, as a strong proof of the plaintiff's recognition as a partner, that he negotiated a sale of a large quantity of iron to a mercantile house in St. Louis, with the knowledge and approbation of the Gaylords. Without noticing in detail the correspondence between the plaintiff and the St. Louis house, it is sufficient to state that while he intimates that he has an interest in the Portsmouth Iron Works, he does not use the name of the firm, as he properly might do, if a partner, but subscribes

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the letters T. G. Gaylord & Co., by *Thomas McNamara*. This fact repels any presumption that might otherwise arise from this transaction that he was a partner.

There is one fact, full of significance as to the understanding of the parties, in regard to the question of partnership. It is in proof, that, in accordance with an established usage of the firm of Gaylord & Co., an account of stock was taken in the beginning of October, 1854, and a few days after the plaintiff had assumed the duties of manager; and that in taking this account no notice was taken of his interest as a partner. It also appears that there was no change in the partnership books, and that no charge was made against the plaintiff as for stock purchased. Nor was any notice given to the public, through the papers or otherwise, of any addition to or change in the membership of the firm. It is incredible that a step of such interest to the parties should take place without being noticed in some or all the ways referred to. And on this question of partnership, it is proper here to notice that the proof is very explicit that Benjamin G. Gaylord often, and in very emphatic terms, denied the fact of the plaintiff's interest in the concern, and affirmed that his connection with it was exclusively that of a manager. But, without extending my remarks on this point, I may state it as my unhesitating conclusion, that the evidence wholly fails to establish affirmatively that the plaintiff was in fact a partner, or that he was recognized and accepted as such.

There is another aspect of this case, as presented by the plaintiff's bill, to which I will briefly advert. It is claimed, as I understand the allegations of the bill, that apart from the contract, if the court is satisfied the plaintiff has rendered valuable service to the firm of Gaylord & Co., and that during the period of such service large profits were made, he is entitled, on the broad principles of equity, to his proportionate share of such profits, and to a decree that will carry out that object. The basis of this claim is, that although the first payment of \$5,000 was not made,

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the one-eighth of the profits from October, 1854, to October, 1855, were nearly, if not quite, enough to meet that payment, and that the plaintiff was entitled to credit on the contract for his proportion of such profits. He avers in his bill that in October, 1855, he requested a settlement with Gaylord & Co., on this basis, which they refused. It also appears from the plaintiff's letters written in 1855, that this proposition had been a subject of correspondence between him and Gaylord, Sen., and had been uniformly declined by the latter, with a protestation that the plaintiff was not entitled to anything on the ground urged by him.

It is only necessary to say on this point, that this was no part of the contract of the parties. The contract clearly contemplated the payment of the entire amount of \$15,000. No principle of equity requires that the profits should be appropriated as claimed by the plaintiff; nor had the proposition a shadow of reason for its support. It was in effect saying, that without the contribution of a dollar to the capital of the firm, and after being paid his salary for his services as a manager, he was still entitled to all the benefits of an actual partner. The equitable phase of this matter would be different, if the plaintiff had devoted his labor and skill for the interests of the firm without any agreement for compensation as manager; but being fully paid for his services in that capacity, no reason is furnished for claiming a share of the profits.

But it is unnecessary to pursue this investigation. And without noticing the other points presented in the case, I have no hesitation in announcing the conclusion, that the plaintiff was not a partner of Gaylord & Co., and is not entitled in equity to an account of profits. The bill must therefore be dismissed.

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(CIRCUIT COURT.)

JOHN R. MOFFITT v. ABRAHAM GAAR, JOHN M. GAAR, ET AL.

An inventor has no legal rights or immunities under a patent, except such as are conferred by the statute.

With whatever solemnity or observance of legal form it may have issued, if wanting in any substantial statutory requisite, it is a nullity.

The surrender of a patent for reissue is equivalent to a distinct admission, made in the most solemn form, that the patent has no validity in the sense of entitling the patentee to an action for its infringement.

The statute gives no right of action for an infringement occurring under the original and void patent, and before the reissue of the new patent.

LETTERS patent of the United States for an "improvement in grain separators," were granted to John R. Moffitt, November 30, 1852. This patent was surrendered and reissued to him March 23, 1858. Suit was brought against the defendants, March 22, 1859, to recover damages for the infringement of the reissued patent. After the bringing of the suit, and before the rule day for plea, the plaintiff surrendered his patent for the purpose of obtaining a second reissue. Thereupon the defendants set up, by way of plea, "that since the commencement of this action, and before the 17th day of May, 1859, to wit: on the —— day of ——, the said John R. Moffitt surrendered to the United States the patent before that time issued to him, and for the alleged infringement of which this suit is brought, and this he is ready to verify," etc.

This plea was filed October 25, 1859. To this the plaintiff demurred, claiming: first, that a plea of surrender only was not sufficient, that it did not appear that the patent was surrendered for reissue or for any cause that rendered it void; and, second, that the reissue of a patent did not necessarily admit the invalidity of the original, and that suits upon such original, pending at the time of the surrender, might be maintained.

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G. M. Lee and S. S. Fisher, for plaintiff.

N. C. McLean and H. Stanbery, for defendants.

OPINION OF THE COURT :

This suit is brought for an alleged infringement of the exclusive right of the plaintiff to an improvement in grain separators, or threshing machines, secured to him by patent. The declaration avers that a patent issued to the plaintiff on November 30, 1852, which was afterward surrendered by him, and reissued on March 23, 1858. The infringement alleged is, that subsequently to the reissue of the patent, the defendants constructed a large number of the separators, or machines, on the improved plan of the plaintiff's improvement, and in violation of his right.

The defendants, in their plea, set up as an answer to the plaintiff's claim, that since the commencement of this action he has again surrendered his patent to the United States. To this plea the plaintiff has filed a general demurrer; and the question which it presents is, whether an action can be maintained for an infringement of a patent which has been surrendered under a provision of the statute authorizing that procedure.

In the argument of the demurrer, no case was referred to in which the precise point before the court has been judicially determined. It is believed there is no such reported case, and we are left, therefore, without the light of any direct authority bearing upon it.

The inquiry is not, whether a surrendered patent is for all purposes to be regarded as a nullity, but whether the patentee has a remedy for its infringement. Section 13 of the patent act of July 4, 1836, provides, "That whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative or invalid, by reason of a defective or insufficient description, or by reason of the patentee claiming in his specification as his own invention more than he had a right to claim as new,

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if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor for the same invention for the residue of the period then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specification."

It is also provided in the same section, "that the patent so reissued, together with the corrected description and specification, shall have the same effect and operation in law, on the trial of all actions hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing of the original patent."

It is an undoubted truth, that an inventor has no legal rights or immunities under a patent, except such as are conferred by the statute. With whatever solemnity or observance of legal form it may have issued, if wanting in any substantial statutory requisite, it is a nullity. And such defect is always available as a defense in a suit for an infringement. By section 6 of the act just referred to, every inventor, before he is entitled to a patent, is required to describe his invention or improvement "in such full, clear, and exact terms," that its precise character, and the manner of its use and application, may be known. And where the invention consists in an improvement, or new and useful application of something before known, he must carefully distinguish between what is old, and what he claims as his invention. And it is every day's practice in judicial trials, to declare patents void for a failure to comply with statutory requirements.

In the liberal and benignant spirit in which our patent system has been conceived and carried out, section 13 of the act of 1836 gives to the patentee a right to correct his description or specification, when its imperfection has re-

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sulted from inadvertency, accident, or mistake. This is effected by a surrender of his patent, and obtaining a new patent upon an amended specification. By this means he is protected from some of the effects of his error, and secured in the enjoyment of all his rights as an inventor, after the emanation of the new or corrected patent. But the statute gives no right of action for an infringement occurring under the void patent, and before the reissue of the new patent. In the present case, the grounds on which the old patent was surrendered, and a reissue authorized, are not before the court. But the court must presume that they were such as, by the language of section 13, authorized the surrender of the old patent, and the granting of a new one. The only condition on which this can be done, is that the original patent is "*inoperative or invalid*" by reason of a failure to comply with the requirements of the statute. The proceeding is, therefore, equivalent to a distinct admission, made in the most solemn form, that the patent has no validity in the sense of entitling the patentee to an action for its infringement. The new patent can be operative only from its date, as affording the patentee a remedy for an infringement. The statute expressly negatives the idea that it was intended to give a retrospective operation to the new patent, and entitle the patentee to an action for an infringement previously accruing. It was, doubtless, competent for the legislature to have declared that the new patent should have this effect, but the language used imports the opposite intention. The statute provides, in express terms, that the reissued patent "shall have the same effect and operation in law, on the trial of all actions hereafter commenced for causes *subsequently* accruing, as though the same had been originally filed in such corrected form, before the issuing of the original patent." Now, the allegation of the plea in this case is, that after the cause of action accrued, and after the commencement of this action, the plaintiff surrendered his patent. The demurrer ad-

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mits the truth of this averment. The claim of the plaintiff, then, is based on infringement occurring under the old patent, and not for a cause of action accruing after the date of the reissued patent. Clearly the statute affords no remedy for such an infringement. Any other construction of the statute would result in the absurdity of conferring on the patentee, as the result of the surrender of what he admits to be an invalid patent, rights and immunities which he could not claim without such surrender. In other words, the legal effect of the reissued patent would be to give force and vitality to the original patent, in the face of the admission of the patentee that it was inoperative and invalid. This may be illustrated by supposing that the patentee had made no surrender, but had chosen to rest his rights on the original patent. Is it not clear that there could have been no recovery in that case for an infringement? The patentee would have been met with the unanswerable objection, that the patent was invalid, from a fatal omission to comply with the requisition of the statute. And there can be no pretense for claiming, that by the surrender of the old patent, and the emanation of a second one, the patentee, as to infringements occurring under the original patent, is placed in a better situation than if there had been no surrender and reissue.

In any aspect of this question, we are clearly of the opinion that the plaintiff is not entitled to recover, and that the demurrer to the plea must be overruled.

(CIRCUIT COURT.)

JAMES WHITE v. FREDERICK ARLETH AND ANDREW SHROTH.

The court will not grant a new trial on the ground of newly-discovered evidence, unless satisfied that if a new trial was had a different result would follow.

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The rule of damages for the non-fulfillment of a contract for the delivery of property, is the difference between the price at which it was agreed it should be delivered and its actual market value at the time and place of delivery specified in the contract.

The court will not set aside a verdict on the ground of excessive damages unless the damages are palpably excessive, or if the action is on a contract, they exceed the legal liability of the defendant under the contract.

Where it is stipulated in a contract that certain acts are to be done or omitted, and the contract is of such a nature that the actual damages of non-fulfillment are susceptible of computation in money, and a sum is named in the contract as a penalty or forfeiture for a violation, it is to be viewed as a penalty and not as liquidated damages, and in such case the actual damages sustained will constitute the rule of recovery.

Where the word penal or penalty is used in a contract, it must be construed as being so intended by the parties, but where a sum named is called liquidated damages, it will be held as a penalty if it seems from the contract that it was so intended by the parties, and the justice of the case requires such a construction.

J. Brown, for plaintiff.

R. M. Corwine and Joseph Egly, for defendants.

OPINION OF THE COURT:

In this case a jury having rendered a verdict in favor of the plaintiff for damages, the defendants have filed a motion for a new trial, upon the grounds following: 1. The verdict was against the evidence; 2. Newly-discovered evidence; 3. Excessive damages; 4. Misdirection of jury by the court.

The declaration is in covenant on an agreement under seal, averring that Arleth, as principal contractor, with Shroth, as his surety, agreed to furnish plaintiff for six months from November 10, 1858, the still-slop of three hundred bushels of grain daily, at six and one-half cents per bushel. It is averred that Shroth bound himself as surety in the penal sum of one thousand dollars, that Arleth would run his distillery and furnish said quantity of slops for the six months and at the price stated.

Plaintiff avers his readiness and willingness to receive and

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pay for said slops, and avers as the breach of the contract that Arleth has failed to deliver the slops according to the agreement, and claims as damages the difference between the contract price of the slops and their market value at the time they should have been delivered. The pleas originally filed were: 1. A general plea of performance; and, 2. That plaintiff had released and discharged the defendants from their obligation under the contract. The plea of performance was withdrawn before trial, and the case was put to the jury on the plea of release and discharge from the contract. The plaintiff proved by a witness, Leslie, that the hogs were at the distillery on the 10th of November, and that he was from that time ready to receive the slops; that no slops were delivered for several days after the 10th of November, and that up to the 26th of January following, there was only a partial delivery of the quantity required by the contract, and that on that day Arleth shut up his distillery and no more were delivered. The witness also stated that he was always ready as the agent of plaintiff to pay for the slops according to the contract, and did pay in full all that was delivered up to the 18th of January. It was also proved that the price of slops from November to January ranged from ten to twenty cents, and that the average price from January to May was about fifteen cents a bushel. Having offered this evidence, the plaintiff rested, and the defendant introduced a witness, Frederick Arleth, Jr., the son of defendant Arleth, who stated, in substance, that he was present at a conversation between his father and the plaintiff, on the 13th of November, in which Arleth said to plaintiff he would not deliver any more slops under the contract, and that plaintiff must take his hogs away, as he had broken the contract in not having the hogs there on the 10th of November. This witness says that after some further conversation between Arleth and White, Arleth agreed to furnish slops at the contract price, but not for any certain time, nor in any certain quantity. The witness does not say that the plaintiff, White, assented to the proposed modification of the contract. The

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defendant also introduced several witnesses tending to prove that the plaintiff's hogs were not at the distillery on the 10th of November, and that, therefore, he was not ready to receive the slops according to his contract. The case was committed to the jury upon this evidence, and the jury were instructed by the court, that if they believed the original contract had been changed or modified by the parties, and that both parties had recognized and acted under such modified contract, the plaintiff was not entitled to recover under the original contract, on which he had declared in this action, and that in that case their verdict must be for the defendants. The credit and weight to be given to the evidence as to the change of the contract, was left to the jury on the evidence. And the jury were instructed, that if there was no change in, or rescission of the original contract, the defendants were liable for a breach of that contract, and that the rule of damages was the difference between the price at which defendants agreed to deliver the slops, and their actual market value at the time they should have been delivered. The jury came to the conclusion, on the evidence, that the original contract was in force, and computed damages accordingly for the plaintiff. It was the province of the jury to pass on the evidence as to a change of the contract; and, having done so, according to their views of the weight of the evidence, the court does not feel warranted in disturbing the verdict as being against evidence.

The newly-discovered evidence of the defendants is to the effect, that Leslie, the witness for the plaintiff, was not at the distillery with the hogs on the 10th of November. The affidavits are by no means conclusive on this point. But a new trial can not be granted on this ground; because the effect of the evidence is only to impeach or contradict a witness who testified on the trial. If produced, the evidence would be only cumulative. If a new trial were granted on this ground, and this evidence introduced, it would not be material and relevant. The only effect would be to show that plaintiff was not ready to receive the slops on the 10th of

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November; but if this were so, it would be no ground for a forfeiture of the contract, and defendant would have his remedy by action, for a breach of the contract. A court will not grant a new trial on the ground of newly-discovered evidence, unless satisfied, if a new trial was had, a different result would follow.

A claim of excessive damages is urged as a ground for a new trial. It is impossible for the court to know on what data the jury estimated damages; but, as the question of damages is always within the discretion of the jury, a court will not set aside a verdict on that ground, unless the damages are palpably excessive; or, if the action is on a contract, they exceed the legal liability of the defendant under the contract. Upon the first ground stated there is no reason for disturbing this verdict; for if the contract does not limit the damages to be recovered for a breach, to a specific sum, upon the legal rule given to the jury, the amount of damages was easily computed by the jury, and the amount returned by the jury does not exceed the rule, and is not, therefore, excessive. But it is insisted by the defendant's counsel, that this contract limits the amount of recovery for a breach to \$1,000, and that the jury could not exceed this sum. This point was not pressed by counsel, on the trial, and no special instruction being asked for, the court did not embrace it in its charge. If this point is sustainable in law, the verdict must be set aside. The court will now briefly consider the two questions involved, which are: 1. Have the parties fixed by their contract the amount of damages to be recovered for a breach; 2. If there is no such limitation as to Arleth, the principal in the contract, is there a right of recovery as against Shroth, the surety of Arleth, who is sued jointly with him.

It will not be necessary to inquire whether, under the pleadings in this case, the defendants are in a position to urge this point. Strictly and technically, as there is no plea but that of release and discharge of the defendants from their contract, there is an admission of record that

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the contract is as set forth in the declaration, and that damages are recoverable as claimed. But waiving this point, is the plaintiff limited by this contract to \$1,000 damages, either as against the principal or the surety? Without reciting the contract at length, it will be sufficient to state its substance. Taken as a whole, it is a contract by which the defendant, Arleth, a distiller, agrees to supply the plaintiff for one year from November 10, 1858, daily, Sundays excepted, the slops for feeding hogs which will be produced by an average of three hundred bushels of grain per day, with the right reserved by Arleth to put an end to the contract at the expiration of six months. And the plaintiff binds himself to pay for the slops at the rate of six and one-half cents the bushel, through the whole year, if Arleth shall elect to continue the contract after the end of six months, and to pay for the slops every two weeks. Arleth agrees to furnish tubs for the slops, and fill the slops into the tubs, and pens for six hundred hogs. And the parties agree, that if during the year the distillery should be burnt, or otherwise injured, Arleth is to be relieved from the contract for the time necessary to repair or rebuild. Then comes the sixth clause in the contract, which is in these words: "The said Arleth binds himself to the said White, his representatives or assigns, in the *penal* sum of \$1,000, that he will run on, and furnish slop for the period of six months, commencing on November 10, 1858, and he gives Andrew Shroth as his surety for the performance of this condition. And the said Andrew Shroth hereby agrees to be the surety of said Arleth, by signing his name to this instrument. It is then provided, that if Arleth should decide to furnish the slop for the whole year, Shroth will continue his surety in the same manner as for the first six months. By the last clause in the contract, White agrees that if he should refuse to take and pay for the slops, at any time, according to the agreement, he will pay to Arleth "the sum of one thousand dollars as liquidated damages, for the payment of which, he, and Andrew Shroth as his surety, hereby

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bind themselves." This contract is somewhat peculiar in this—that the same person is surety for both the contracting parties; and in this, also, that in that part of the contract in which Shroth binds himself that Arleth shall supply the slop, as provided for in the contract, the sum of \$1,000 is designated as a penalty, or "penal sum," and in that part of the contract in which White is bound to pay \$1,000 for a failure, and in which Shroth undertakes as his surety, it is called "liquidated damages." The first question arising is, whether the defendant, Arleth, is liable in an action for a breach of this contract for more than the \$1,000 penalty named in the contract? There can be no question that the \$1,000 is to be viewed, not as liquidated damages, but as a penalty. The language of the contract, as well as its character, justify this construction. The defendants expressly designate it as "the penal sum of \$1,000." As before noticed, the plaintiff agrees that as to him, if he fails in the performance of his part of the contract, the \$1,000 shall be deemed "liquidated damages." The words may, therefore, be well presumed to have been understood by the parties. The authorities are numerous, that in a contract in which certain acts are to be done, or omitted, and the contract is of such nature that the actual damages are susceptible of computation in money, and a sum is named as a penalty or forfeiture for a violation, it is to be viewed as a penalty and not as liquidated damages, and in such case the actual damages sustained will constitute the rule of recovery. *Taylor v. Standiford*, 5 Peters' Condensed Rep. 210; 7 Wheaton, 13. In Sedgwick on Damages, the point is very fully discussed and many authorities referred to, English and American. The rule seems invariable, that where the word penal, or penalty, is used, it must be construed as being so intended by the parties. But the converse of this rule does not hold. There are many cases in the Reports to the effect, that though the sum named is called liquidated damages, it will be held as a penalty if it seems from the contract that it was so intended by the

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parties, and the justice of the case requires such a construction.

In this contract, it is fair to infer it, as the intention of the parties, that the sum named as the penalty in case of a failure by the defendants, was inserted, not as the measure of compensation in case of an abandonment of the contract, but as designed to secure a faithful observance of its stipulations by White. By the contract, the defendant, Arleth, was bound daily to deliver the slops certainly for six months, or, at his option, for a year; and White was obligated to receive the slop, and pay for them every two weeks. It is not to be presumed that the parties intended the \$1,000 as a full indemnity under any circumstances of failure that might happen. It follows that the jury were not limited, in the computation of damages, to the penalty named in the contract. Considered as a penalty, it was optional with the plaintiff to sue for that or claim the actual damages which he could prove from the non-fulfillment of the contract by the other party. The rule seems to be, without exception, that where the action of covenant lies, the parties may sue either for actual damages or for the penalty.

It is conceded that a surety can not be held liable beyond the obligation he assumes. Defendant's counsel contend that he only assumed a liability for \$1,000, and can not be held responsible beyond that. The undertaking by defendants, Arleth and Shroth, must be viewed as joint. Arleth agrees that he will run the distillery for six months and supply the slop daily; and Shroth, as surety, covenants that Arleth will do it. It is a joint undertaking, and they may be jointly sued. The measure of the surety's liability is the same as that of Arleth, and he is liable to the same extent. If Arleth is liable for actual damages beyond the penalty named, his surety is liable to the same extent. Upon the whole, the court can see no ground for disturbing this verdict. Upon the law, as stated, the jury had a right to compute the actual damages sustained by the plaintiff. The amount was susceptible of easy computation. The

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contract proved the quantity of slop which Arleth agreed to deliver, and the price which he was to be paid. There was clear proof of the quantity delivered during the six months, which made it clear what the deficiency was. There was clear proof of the market value of the slop for the period during which there was a failure. The average market price of the slops, for the eighty-eight days during which Arleth failed to deliver the slops, was fifteen cents a bushel; and the difference between that and six and one-half cents, the contract price, was the rule of computation which the jury pursued, etc. It is doubtless true, that owing to the great advance in the price of grain after the date of the contract, its performance involved great loss on the part of Arleth. But this was his misfortune, for which the court can not give a remedy.

Motion overruled.

(CIRCUIT COURT.)**JUNIUS JUDSON v. NATHAN COPE AND WILLIAM R. HODGSON.**

Upon the issue of novelty, testimony will not be received to show what *might* have been done with prior machines. This is mere speculation, and not fact.

The notice of special matter, required under section 15 of the act of 1836, must give the name of some person who had knowledge of the prior use at the place indicated. It is not enough to name the parties using the thing—the notice must state the name of some witness.

It is not competent for a defendant to show use in a foreign country. All that the statute contemplates is proof of the invention as set forth in a patent or printed publication.

In a trial at law, it is not competent to compare prior machines with that used by the defendant. The issues of novelty and infringement are distinct, and the testimony upon the issue of novelty must be confined to a comparison of the prior machines with that of the patentee.

Whether a mere drawing, unaccompanied by any description whatever, can be received as a printed public work, *quære*.

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The superior working of the patented machine, as distinguished from all prior machines, may be evidence of a difference in principle, and is competent testimony upon the issue of novelty.

To make the defense of prior publication in a foreign country available, it must appear that the improvement has been so clearly and intelligibly described, in the prior publication, as that the invention could be made or constructed by a competent mechanic.

Such proof of prior knowledge must be anterior not merely to the date of the patent, but to the time when the invention was actually made.

Upon the issue of infringement, the jury are not to inquire whether the two things are identical in structure, form, or dimensions, but whether they involve substantially the same mechanical principles.

THIS was an action on the case, tried before the Court and a jury. The suit was brought upon the patent for "improved valves for governors," granted to Junius and Alfred Judson, and more fully set forth in the report of the case of *Judson v. Moore*, 1 Bond, 285. In the present action the manufacturers and patentees of the infringing valve were sued. The defendants plead the general issue, and gave long notice of special matter, embracing over forty prior valves, and upon the trial the testimony of one hundred and sixteen witnesses was given to the jury.

Certain rulings in the progress of the trial are believed to be of value.

A witness having testified to the use of a certain prior valve upon locomotives, where it was actuated solely by hand, was asked by defendants' counsel:

Ques.—What change would have to be made in order to permit this valve to be actuated by a governor?

Question objected to.

THE COURT.—This witness has testified that in 1834 a valve was applied to railroad locomotives; and the question is asked whether, in his judgment, it could be used in connection with a governor, so as to regulate the steam engine. It seems to me this is going rather into the region of speculation than of fact; and, though the witness, it is true, is produced as an expert, still his opinion is for a different purpose. What this valve might have been applied to is a mere

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matter of speculation, and the question is objectionable in this point of view. I suppose it is going too far to ask what *might* have been accomplished. It is, perhaps, a matter of argument for the jury, but the question is whether you can give evidence of the speculative opinions of the witness. The question is overruled.

One George French was called, who examined a valve described and shown in "Lardner on the Steam Engine," a work published in London. He was then asked by defendants' counsel:

Ques.—Have you any knowledge of such valve being known and used prior to 1850, by James Watt, at his manufactory in Birmingham, called Soho?

Question objected to. 1. Because of the want of sufficient notice, inasmuch as the notice does not state "who had knowledge" of the use of the said valve by James Watt; and 2. Because no proof of foreign use can avoid an American patent. The proof must be confined to the publication.

The notice averred that the patented valves "were in use in foreign countries, and described in certain printed publications anterior, etc., and used by James Watt and Mr. Matthew Boulton, in the city of Birmingham, at the manufactory of Boulton, known as 'Soho,' England, and elsewhere in England and Scotland."

The witness, French, was named in another part of the notice, as possessing knowledge of the use of valves in America, but not at "Soho," in England.

THE COURT.—I think this question never has been raised here before. The notice under which the evidence purports to be produced sets forth that the invention patented by Judson was known in foreign countries prior to the date of this patent, and was described in certain printed publications before the date of his discovery, and then goes on to affirm that it was used by James Watt and Matthew Boulton, in the city of Birmingham, at the manufactory of Boulton, known as "Soho," in England. It does not set forth the name of the person by whom the fact is to be proved,

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but simply that it was used by James Watt at a certain place in Birmingham. Now, I think the statute is clear in requiring the name of the person who had knowledge of the use, and the place where it was used. As in this case, if the averment had been that the witness French, residing at a certain place described, had knowledge of the fact that James Watt had known and used this invention in England, perhaps the proof would be competent. If the notice had averred that this witness had knowledge of the use of this invention, at Birmingham, at the time stated, the question perhaps might be admissible.

I must say that I entertain very serious doubts whether you can go beyond the publication itself. The statute is express in declaring that the prior use and knowledge of the invention, and use in foreign countries, does not affect the validity of the patent in this country, unless that invention had been described in a printed publication, or had been patented in a foreign country.

It seems to me where the invention has been described, or has been patented, it is not competent for the defendant to show the use in a foreign country. All that the statute contemplates is the proof of the existence of the invention as set forth in a patent or publication. If the identity of the two things can be established to the satisfaction of the jury, the fact of the publication in a foreign country is just as fatal as if there were positive proof that the thing had been known and used at a specified place.

A witness having explained a valve described in "Tredgold on the Steam Engine," was asked by defendants' counsel:

Ques.—How does the valve described by Tredgold resemble the Cope & Hodgson (defendants') valve?

Objected to; because the issues of novelty and infringement are distinct. Prior valves can only be compared with the patented valve upon the issue of novelty; the defendants' valve can only be compared with the plaintiff's upon the issue of infringement.

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THE COURT.—You may ask how it resembles the plaintiff's valve, but when you ask how it resembles the defendants' valve, you might just as well ask how it resembles anything else. Of course it is competent for defendants to show prior knowledge and use of any valve that is substantially like that patented by this plaintiff. To show prior knowledge and use of a valve substantially like that patented by the plaintiff, is one of the issues of this case. All evidence tending to that point is, undoubtedly, admissible. But I can not see how any comparison is to be instituted between the Cope & Hodgson valve and the one described in that book. I do not see how it tends to enlighten the jury upon either of the issues.

The defendants had given notice that the patented valves were described in certain printed publications, anterior, etc., and that "the descriptions in said printed publications, and in which reference is made to such valves, are as follows, viz:—" In the list which followed was named, among others, a certain German work, which, when offered in evidence, consisted of plates or drawings only, without any printed description.

This proof was objected to.

THE COURT.—I suppose it is not a matter of great importance in this case, but I should hesitate very much to accept a mere drawing, unaccompanied by any description whatever. I think it is not admissible under the present notice.

The defendants having rested, without attacking the utility of the patent, but having offered much proof to show want of novelty, the plaintiff offered to read a deposition to show the superior working of the Judson valve, to the prior valves that had been offered in evidence. To this proof the defendants objected as follows:

"We object to the deposition, and all other proof of this nature, because it only proves utility, which we do not deny. The superior workings of Judson's valve can not

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prove its novelty, or the inferior workings of the old valves prove that they differ from Judson's."

THE COURT.—If the evidence were not offered on the question of utility, I should hesitate to admit it. It is true, as the case now stands, that the utility of the plaintiff's invention has not been directly impeached, and is not controverted. The plaintiff having rested upon the presumption arising from the patent itself, it would not be admissible to show it was of utility. The only question, as I suppose, is whether it may not be received upon the question of novelty. It has been the object of the defendants to show that the plaintiff's invention was not original with him—not new—and that therefore his patent was not a valid one; and in support of that proposition, they have introduced evidence of valves in use at different places before the date of this patent, which, they claim, embodied the same principle as the plaintiff's valve in regard to the nature of the openings and principles of graduation. It is very evident, from this aspect of the case, that there may be a question, not free from difficulty, as to the identity of the plaintiff's invention with the valves, in regard to which evidence has been offered. Now the only question is, whether it is competent for the plaintiff to offer evidence of the utility of his invention—that in its practical operation it produces results which have never been produced by any valves used before, and would this assist the jury in coming to a conclusion. I do not suppose it would be competent for one claiming under a patent, to rest the novelty of the invention solely upon the fact that it may be superior; but it does seem to me, as the case now stands before this jury, it will be a matter that will tend to lead them to a just conclusion upon the question of novelty, if the plaintiff can show upon testimony, that the working of this invention is different, and decidedly superior in its results. I think this point was ruled very distinctly by Judge Nelson, in the case referred to, and we admitted such evidence in a former case here, and it strikes me as being based

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upon very good sense, and I have no doubt it is very sound law. There may be cases in which the mind of the jury will be much aided by evidence of the practical workings of the invention; and if the superiority is marked and decided, it is possible it might determine the question. Of course, in whatever testimony is offered, it must appear to the jury that it was the thing patented to which the testimony refers. I shall therefore admit the evidence.

The charge of the court, in *Judson v. Moore*, having been given in full, certain portions only of the charge in the present case are reported.

G. M. Lee and S. S. Fisher, for plaintiff.

C. B. Collier, J. L. Miner, E. W. Kittredge, and M. W. Oliver, for defendants.

CHARGE OF THE COURT:

There are three questions in this case. The first is a question of law. Its decision devolves entirely upon the court, and upon that point I shall present my views very briefly. It is objected to this patent, in the first place, that it is void upon its face; that it does not appear with reasonable certainty what the patentee claims as new, or as his invention, and that he does not sufficiently describe in his specification or claim in what that invention consists. This objection is, in substance, that the specification or claim does not disclose, legally, a patentable subject, and that the patent is therefore invalid on its face. The invention itself the patentee has called "Improved Valves for Governors." That is the designation or title contained in the patent. In the preliminary part of this specification, he refers to the fact that valves for governors, to regulate the admission of steam into the proper passages of an engine, had been known before; that fact is clearly and distinctly admitted, but it is claimed that they had failed to effect perfect and entire uniformity in the action of the engine, that the

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engine was subjected to vibrations and perturbations that detracted seriously from its efficiency and utility, and, to remedy this defect, the patentee proposes the invention for which this patent was granted. This object he sets forth in these words in his specification: "The object of our invention is to decrease the perturbation of steam engines, caused by the tension of the steam, or the resistance or load, and the more effectually to check any undue increase or decrease in the motion of the engine, than can be effected by any plan known prior to our invention; and, to this end, the nature of our invention consists in making the steam passage or passages controlled by the governor valve or valves, so that the area, or sum of the areas, of the passage or passages shall gradually increase in capacity not only by the amount of motion which uncovers it, but so that the amount of area opened by any given amount of motion shall be gradually greater toward the fully open end, by means of which any tendency to increase the motion of the engine shall be checked, by reducing the area of the steam passage to a greater extent than would be due to the amount of motion given to the valve, and the tendency to decrease the motion of the engine shall be checked by increasing the area of the steam passage to a greater extent than would be due to the motion of the valve alone, imparted by the governor, under the change of speed of the engine."

I will read to you, here, a passage from the charge of the court to the jury, in the former case, as being the opinion of the court at this time:

"The patentee then describes the mode of constructing his improvement, and the principle of its action, and then sets forth the limitation of his claim, which it is proper to do in all specifications where a patent is for an improvement on what was known before, and which is done to guard against claiming what was previously known. He says he does not limit his invention to any particular form of valve, and refers to valves with circular apertures, as not

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having an increase or decrease of capacity proportioned to the range of motion." Finally, in the summing-up, he says: "What we claim as our invention, and desire to secure by letters patent, is making the opening or openings, controlled by the governor valves of steam engines, of gradually increasing capacity from the closed toward the open position, substantially in the manner, and for the purpose specified."

There is no question but that the claim is for a distinct and independent improvement, and not for a combination. The claim is for an improved valve, and that valve to operate in connection with a governor. There is no claim of an invention disconnected from the governor; it is simply a claim to an invention of an improved valve, to be operated upon in connection with and by the aid of the governor. In deciding whether the subject of this invention is set forth in a clear and intelligible manner, so that we can understand its precise character, it is necessary to take the whole specification together, not simply the summary, at the conclusion, but the entire paper; and the single point is whether, taking the whole specification together, there is a subject set forth and described which in itself is patentable, and whether it is so clearly described that it can be understood, and the precise character of the invention known.

I see no reason for the conclusion that his description of the invention is so uncertain and ambiguous that it can not be sustained as a patentable subject. I will not go more fully into an analysis of these specifications. They appear to my mind to be sufficiently clear.

The second point is the alleged want of novelty in this invention. It is, of course, the right of the defendant sued for an infringement of a patent, to contest the novelty of the invention, and to prove, if he can, that the invention or improvement was known before, and the patentee was not in fact the first inventor. The only limitation to this right of defense, on the part of one sued for an infringement, to

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prevent the plaintiff's being taken by surprise, is, that the defendant should give notice thirty days prior to the trial, of the place where the improvement has been used, and the name and residence of the person to whom such prior use was known. Notice has been given to the plaintiff that this invention had previously been known, and was in use in various places in this country, and also in foreign countries.

However, it is not proof of the want of originality or novelty in the invention for which an American citizen has procured a patent, that it may have been known or used in a foreign country, unless it appears that the invention or improvement was patented in such foreign country, or there described in some public work. But, if it is proved that the invention, or something substantially like it, has been described in a book, or has been the subject of a patent in the foreign country, it is a good defense to an action for infringement in this country. Still to make this defense available, it must also appear that the improvement, which has been known in a foreign country, has been so clearly and intelligibly described, as that the invention could be made or constructed by a competent mechanic. I mean that a mere suggestion or imperfect description of an invention would not be sufficient to defeat the American patentee.

This proof of prior use and knowledge must, of course, be anterior not merely to the date of the patent, but to the time when the invention was actually made. The jury will remember, from the evidence, that the plaintiff had substantially perfected his invention, probably in the month of February, 1849, so that all the proof of prior use and knowledge must go back of that period. Proof of knowledge and use since then would not avail the defense.

There is one consideration that may be useful to the jury in determining the question of the novelty of this invention. You will have noticed, gentlemen, that the court in the present case, permitted evidence to go to you of the practical operation of plaintiff's valve, with a view to show

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that it was different and superior in its operation to any one that had been previously known. The court held, and I still think, correctly, that if the evidence as to novelty and originality, involved the question in any serious doubt, proof of the actual performance of the valve itself was competent to go to the jury upon the question of the novelty of the invention. It will be obvious that, where there is doubt upon the question of novelty, and where the evidence of the witnesses leaves it uncertain whether the principle of the valves was identical, that evidence of the superior performance and utility of the patented improvement would have a direct bearing upon the question of novelty. In other words, if the jury are satisfied that the invention patented produces a result decidedly and clearly different from any which had been produced by the action of any prior valve, and that it was decidedly superior to any other in its operation, it would certainly afford a ground for the presumption that the thing itself had not been known before. It is, therefore, in the present case, proper for the jury to take into consideration the evidence that has been adduced upon that point. There has been a considerable amount of evidence to show the entire success and efficiency of the Judson valve in controlling the action of the engine; in so permitting the passage of the steam from the boiler as to produce a uniform and steady action of the engine, and to prevent perturbations and vibration; and, as was remarked by the court upon the late trial, I still retain the opinion that it will often happen in questions of this nature, that experiment is much more satisfactory than mere theory. It will be often the most satisfactory proof of real character and efficiency. It is true there is some conflict of testimony on this point; there has been some evidence adduced (upon the part of the defendants) to the effect that the Judson valve was not more complete, or successful, or efficient in its operation in controlling the action of the engine than the old butterfly valve previously known. It will be, of course, for the jury to determine the weight to be given to

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the testimony on either side of this question. The number of witnesses undoubtedly preponderates very much in favor of the superiority and complete success of the Judson valve in controlling the motions of the engine. If the jury are satisfied that any of the old valves, concerning which testimony has been given, have this principle of graduation throughout all their range of opening, of course it will lead them to the conclusion that the invention is not new and original. If they should find that this principle had been previously known and in use, though not carried into entire perfection, and yet be satisfied that the principle was clearly and perfectly known and understood beforehand, such proof, I apprehend, would go directly to the question of the novelty of this invention. If, on the other hand, they believe it is a new discovery and application of a new and important principle to the control of steam engines, first invented and carried to perfection by this patentee, although there may have been imperfect contrivances before which did not accomplish the purpose, the claim of novelty on the part of the patentee is sustained.

The third question is, whether these defendants have infringed?

This is exclusively a question for the jury. It is incumbent on the plaintiff to make out affirmatively, by proof, to your satisfaction, that his invention has been infringed, before he would be entitled to your verdict. And in determining this question of identity, I state what is familiar law, that the jury are not to inquire whether the two things are identical in structure, form, or dimensions, but whether they involve substantially the same mechanical principles. It will be palpable to the jury that it would be a reproach to the patent system to say that the rights of the patentee may be violated or infringed by a mere colorable pretense, or by the use of a thing, which, having a different appearance or a different form, nevertheless involves essentially the principles of the patented invention.

The true inquiry is, whether the thing which is claimed

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to be an infringement, does substantially involve the principles of that patented. It has been often said, in trials of this kind, that the principle of a machine has reference to its mode of operation, not to any abstract principles involved in its proportions or motion, but whether as operating machines, the principles of the two are essentially and substantially alike. Where this substantial identity exists, the party sued for infringement can not be protected in the use of what is substantially the invention of the patentee. Whatever, therefore, may be the form of the valve of these defendants, Cope and Hodgson, if it embraces the principle of the graduated increase of opening throughout its entire range of action, there is substantial identity.

There is no claim to any specific amount of damages on the part of the plaintiff; and, I understand from the statement of counsel, that this action is not prosecuted with a view to the recovery of damage. But if the jury believe that the invention is new on the part of Judson, and the defendants have infringed upon his patent, they will give a verdict for nominal damages. There is nothing claimed beyond mere nominal damages.

The jury found a verdict for the plaintiff.

(CIRCUIT COURT.)

THE UNITED STATES v. R. M. CORWINE ET AL.

The sureties upon a bond, wherein the principals have obligated themselves to the United States to open a ship canal three hundred feet in width, and twenty feet in depth, and keep it open the same width and depth for four and a half years from the time of the acceptance of the work by the secretary of war, are discharged from all liability on the same if the principals do not perform their agreement for opening the channel according to its terms, and the government accepts the work with a channel only eighteen feet in depth instead of twenty, as required by the contract.

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A surety is not bound beyond the terms of his contract, and his liability can not be extended or enlarged by implication, and any change in terms, unless expressly assented to by him, releases him from his legal responsibility.

Stanley Matthews, for United States.

R. M. Corwine, for defendants.

OPINION OF THE COURT:

This is an action of debt against Richard M. Corwine, John A. Corwine, and Wm. Wiswell, Jr., as the sureties of Waldo Putnam Craig and William Russell Righter. There is a general demurrer to the declaration on which the questions submitted to the court are presented. The declaration avers, that on November 13, 1856, the defendants executed a bond to the United States, in the penalty of \$75,000, to be void on the condition that the said Craig and Righter should faithfully fulfill their written contract of the same date, whereby they agreed to open a straight ship channel at the outlet of the Mississippi river, known as the *Pass de l'Outre*, to a depth of twenty feet, throughout a well-defined width of three hundred feet, to the deep water of the Gulf of Mexico, and keep the same open to the same width and depth for the period of four and a half years from the time of the completion and acceptance of the work. It is further averred, that by the said contract Craig and Righter were to finish the work within fifteen months from the said November 13, 1856, and that upon its completion to the satisfaction of the secretary of war, the United States was to pay them \$125,000. The declaration also avers, that in consideration of the agreement of said Craig and Righter to keep open the said channel as above stated, the United States agreed to pay them \$36,000 for the period of four and a half years, and at the same rate for the further time they should keep said channel open, until the appropriation for that purpose should be exhausted. It is also recited as a part of said

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contract, that in order to determine whether the agreement to keep open the said channel had been complied with, the secretary of war should appoint an officer or officers to examine the work, at such time as he might deem necessary; and that, if the secretary should be satisfied from the report of such examinations that the channel had been constantly maintained of the width and depth before stated, at the expiration of one-third of said period of four and a half years, eighty per cent. of one-third of the amount of the contract to keep said channel open was to be paid to said Craig and Righter, and one-third more at the expiration of two-thirds of the said time, and the balance at the end of said four and a half years.

The declaration then avers that Craig and Righter proceeded to execute said contract to open said channel; and that on September 10, 1858, they had opened the same at the width of three hundred feet, and with the depth of eighteen feet; and that on that day the work was accepted by the secretary of war, and the contract price of \$125,000 was then paid in full.

The breach of the condition of the bond, as assigned, is that Craig and Righter, since the said September 10, 1858, have not kept the said channel open, with a width of three hundred feet, and the depth of eighteen feet, and that thereby an action has accrued against the defendants, as the sureties of Craig and Righter.

The second count of the declaration is upon a bond which recites a contract identical with that set forth in the first, with the exception that it refers to the opening of another channel at the mouth of the Mississippi. There is, of course, no occasion for the separate consideration of the two counts.

It is not my purpose to examine all the points of exception to the declaration urged in support of the demurrer. There is one, which, in my judgment, is conclusive as to the plaintiff's right to recover against these defendants on the cause of action set out in the declaration. The point of

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this exception may be stated thus: That the declaration shows on its face that Craig and Righter did not perform their agreement for opening the channel, according to its terms, and that the government accepted the work with a channel of only eighteen feet in depth, instead of twenty, as required by the contract, without any averment that the defendants had any knowledge of, or assented to such modification. On this ground, it is insisted the sureties in the bond are relieved from all liability and that this action can not be maintained against them.

The contract, as has been stated, obligated Craig and Righter to make the channel of a specified width and depth, and to keep it open, of that width and depth, for four and a half years from the time of the acceptance of the work by the secretary of war. The defendants became their sureties in a bond conditioned for the faithful performance of these stipulations. The work was accepted by the secretary of war and paid for in full, as if completed according to the contract. The government had a right to forego the terms of the contract, in regard to the depth of the channel, and to accept one of less depth. In doing this, the obligation of the contract as to the dimensions of the channel was at an end, both as to the principals and the sureties, and the government was estopped from asserting any claim for a violation of that part of the contract. It was, in effect, the substitution of a new contract for that originally entered into by the parties. But it is claimed that the defendants, as sureties, are liable upon the averment in the declaration that Craig and Righter failed to keep open the channel as accepted by the United States. There seems to be an incongruity between the contract set out in the declaration and the averment of its breach. In other words, the declaration avers a breach of a contract, for the performance of which these defendants contracted no obligation as sureties. Their undertaking was, that a channel twenty feet in depth, made in all respects according to the requirement of the contract, should be kept open for a

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specified time. The United States waived that part of the contract which specified the depth of the channel, and accepted the work with a channel of a less depth. The sureties are in no sense parties to this arrangement, and therefore not bound by it.

There is no principle better settled than that a surety is not bound beyond the terms of his contract, and that his liability can not be extended or enlarged by implication; and any change in its terms, unless expressly assented to by him, releases him from his legal responsibility. This is familiar law—so long and so well settled that it is not necessary to cite the numerous cases by which it is sustained. Its application to the present case is so apparent, as not to admit of doubt or controversy. As already stated, these defendants as sureties, guarantied that Craig and Righter should maintain a channel of a specified depth. The bond to which they were parties, though executed at the same date of the execution of the contract, could not take effect, so far as it related to keeping the channel open, until the channel was excavated as required by the contract. The averment of the declaration, however, is that such a channel has not been made, and was not insisted on by the government. It follows as an inevitable conclusion, that the condition on which alone the sureties became bound for the maintenance or continuance of the channel, and on which their obligation was to attach, did not occur. There never was a channel of twenty feet depth, and their undertaking to keep it open was never operative, and is of no obligation on them. The contract provided that the work should be inspected by an officer to be appointed by the secretary of war; and if it appeared from his report “that the work has been properly executed, and that a straight channel of the above width and depth actually exists,” it was to be paid for; but if it should be found “that the work had not been completed agreeably to the contract,” the contractors were to receive no pay for what they had done. It is clear, therefore, that the acceptance of the work by the govern-

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ment before a channel was opened, as required by the contract, left nothing on which the guaranty of the sureties could operate.

This view would seem to be decisive of the question raised on this demurrer, and it is not a material inquiry whether the interference of the government, and its acceptance of the work not executed according to the contract, could affect, injuriously or otherwise, the interests of the sureties. The only ground on which it is claimed that the sureties are liable is, that the acceptance of the work in its incomplete state has not placed them in any worse condition than if the contract had been strictly complied with, and that their liability on their undertaking that the channel should be kept open, continues unaffected by the act of the government. The first reply to this assumption is, that any change in the terms or obligation of a surety, without his consent, releases him from liability. And it is well settled, that this principle applies, even in cases where a modification of the contract is favorable to the sureties. But in this case, if it be conceded that the government had a right to waive a strict performance of this contract on the part of Craig and Righter, and to insist on the continued legal liability of the sureties, for the reason that they were not injured by the act of the government, the facts will not sustain the position. Their obligation was, that the contractors should keep open a channel of the depth of twenty feet. Now, it needs no argument to prove that a channel of only eighteen feet in depth would be much more liable to fill up or become obstructed than if it were twenty feet deep. The pressure of the water being so much greater in the latter case, the probabilities that the channel would fill up would be greatly lessened; in a word, there is a palpable difference in an undertaking to maintain an open channel made to the depth of twenty feet, and one but eighteen feet deep.

I will only add, that while, in my judgment, the law of the case is with these defendants, and am clear that this

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action can not be maintained against them, I am equally clear that no claim of justice is invaded by holding them to be exempt from liability. Under the circumstances of the case, an opposite conclusion would operate inequitably on them. There was a moral obligation on the government, to protect the rights of these sureties as far as practicable, without a sacrifice of its own interest. Under the contract, the government was not bound to pay anything for the work, unless it was completed according to the terms of the contract. If, without consulting the sureties, it was deemed expedient to pay the full contract price for the excavation of a channel but partially made, they are fully justified in asserting their exemption from liability. And it would be a most rigorous application of law that would enforce the payment of the penalty of their bond.

But without further discussion of the points presented on this demurrer, I am led unhesitatingly to the conclusion that it must be sustained.

(CIRCUIT COURT.)

ISAAC PARRISH v. SAMUEL DANFORD ET AL.

Where a valid levy was made upon property by a sheriff, and it was wrongfully removed from the place where the sheriff had left it, he had a right to take possession of the same wherever he could find it, if he used no more force in doing so than was absolutely necessary, and all who assisted him are also justified.

The question of fraud is one of law and fact. The court declares what constitutes a legal fraud, and it is for the jury to say whether the evidence proves the fact of fraud.

In Ohio, a man may, under some circumstances, prefer one creditor to another, if it is done in good faith, and no fact appears from which a fraudulent intent can be inferred.

No man, knowing himself to be insolvent, can make a valid disposition of his property, except for the benefit of creditors.

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If there has been a delivery of property and full payment made in good faith, the right of the purchaser will not be interfered with ; but if the purchaser has notice of a fraud before getting possession and making payment of the consideration, the creditors may intervene and the contract will be set aside.

The execution of a bond of indemnity to a sheriff making a levy, makes the person so executing a trespasser, if the act of the sheriff was illegal. In trespass, all who are liable are liable as principals.

If the parties to a sale and purchase of property intend thereby to defraud creditors, the fact that a full consideration was paid will not make it valid.

Mr. Evans, for plaintiff.

Lee & Fisher, for defendants.

CHARGE OF THE COURT :

This is an action in trespass brought to recover damages for the unlawful seizure of the goods of the plaintiff. The defendants are Samuel Danford, the sheriff of Noble county, Ohio, John Brownrig, Wm. Brownrig, Hiram Caldwell, and Joseph Caldwell. Wm. C. Okey was also a defendant, but has been discharged. The defendants deny the allegations in the plaintiff's declaration by a plea of not guilty. The ground on which the plaintiff seeks to recover is, that Danford illegally levied on his property to satisfy an execution against other persons, and that the other defendants were aiders and abettors in the trespass. It is not controverted that if the property taken was the property of the plaintiff, the defendants are liable as trespassers. And, if liable at all, they are all liable, as in trespass all are principals. If the act was illegal, all who were present and aided in it are guilty. One of the defendants, John Brownrig, was not present, but he is party to a bond of indemnity to the sheriff, which makes him a trespasser if the act of the sheriff was illegal.

It appears that on October 20, 1859, an execution, issued on a judgment in the Common Pleas of Noble county, in favor of Brooks, Fahnestock, and others, against

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John W. Brownrig, Edward M. Parrish, and John Brownrig, for more than \$1,100 and costs, and was put into the hands of the sheriff on that day. On the 2d of November, the sheriff levied on a stock of goods in the town of Sharon, in Noble county, which had been owned by E. M. Parrish and John Brownrig, who had been in business as the firm of Brownrig & Parrish, to satisfy the execution of Brooks, Fahnestock & Co. Before the levy, that is, on October 28, Brownrig & Parrish made a sale of these goods to the plaintiff, and the validity of that sale is the only question now in controversy. The goods were not removed at the time of the levy, but remained in the room in which Brownrig & Parrish had done business till the 14th of November, when they were removed by the sheriff to a room in Hopper's tavern, and were under lock and key there till the 20th of December, when they were removed by the plaintiff without the consent or knowledge of the sheriff, to a room in the basement of the Masonic Hall, in the town of Sharon. And on the 22d of December, the sheriff, with others as his assistants, forcibly, by breaking open the outer door, entered the room, retook the goods, and removed them to the town of Caldwell, the county seat of Noble county. As to these facts there is no controversy, and the question is, was the sheriff and his assistants guilty of a trespass in forcibly entering the Masonic Hall basement and retaking the goods? There is no dispute as to the regularity of the original levy. Having an execution against these defendants, the sheriff had a right to levy on the property of any one of the defendants, and the levy was a legal one, if the goods were the property of Brownrig & Parrish at the time they were levied on. It is clear, too, that if the original levy was valid, and the property was wrongfully removed from the place where the sheriff had left it, he had a right to reclaim it and take possession of it wherever he could find it, if he used no more force in doing so than

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was absolutely necessary. And if the sheriff was justified in retaking the property, all who assisted him are also justified. It is apparent that this case turns wholly on the question of the title to this property on the 2d of November, when the levy was made. If it was the property of the plaintiff on that day, the sheriff and all who aided him were trespassers, and liable for the injury sustained by plaintiff. If it belonged to the defendants in execution, the sheriff has done no more than his duty. A sheriff is bound to levy on the property of the defendant in execution, and is liable if he levies on the property of another person. In this case there was a claim of property interposed by the plaintiff under the statute, and a trial by a jury requested. The sheriff being indemnified, retained the property and refused to call a jury. The bond is an indemnity to the sheriff for selling the goods. The sheriff had an undoubted right to pursue this course, but in doing so exposed himself to an action of trespass and to damages, if the claimant of the property made good his title. The jury may consider whether the refusal of the sheriff to call a jury, as requested, is evidence of malice or a spirit of oppression, and this opens the way for the consideration of the question of the ownership of the property on the 2d of November. The plaintiff claims it under a written contract of sale to him by E. M. Parrish and John W. Brownrig, dated October 28, 1859, which was a few days before the levy. By this contract it is agreed, in substance, that Brownrig & Parrish sell to the plaintiff their entire stock of goods, estimated at \$8,000, in consideration of which the plaintiff was to convey to Brownrig & Parrish twenty-five lots in Parrish City, in Iowa, at \$10 a lot, and other lands in Harrison county, in that State, such as Brownrig & Parrish shall select out of 1,200 acres, at from \$4.50 to \$6 an acre. And it is provided that if they are not satisfied with the land, the plaintiff shall pay \$8,000 in six, twelve, and eighteen months, from the time they make their election. And they agreed to furnish money to pay for the freight of

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the goods to Iowa, which was to be refunded in sixty days. On the 24th of November a supplemental contract was signed by plaintiff, and by E. M. Parrish, acting for the firm of Brownrig & Parrish, which recites that Brownrig & Parrish had failed to advance money to pay the freight, and that such part of the contract was released. It was then agreed that Iowa lands to the amount of \$1,200 should be conveyed to E. M. Parrish, and \$900 to the Brownrigs in land, and after deducting some credits to the plaintiff, there was due from him a balance of \$441, which was payable in money. Was this a *bona fide* and valid sale? Fraud vitiates all contracts. The question of fraud is one of law and fact. The court declares what constitutes a legal fraud, and it is for the jury to say whether the evidence proves the fact of fraud. Fraud will not be presumed, and must be affirmatively proved by the party who avers it. The law guards the rights of creditors with great vigilance, and declares all sales and transfers made to hinder, delay, or defraud them absolutely void. The theory of the law is, that no man, knowing himself to be insolvent, can make a valid disposition of his property, except for the benefit of creditors. In Ohio, a man may, under some circumstances, prefer one creditor to another, if it is done in good faith, and no fact appears from which a fraudulent intent can be inferred. How far one who is a purchaser, without notice of any fraudulent intent on the part of a vendor, shall be protected in the transaction, is sometimes a question of great difficulty and nicety, and must depend somewhat on the circumstances of the case. If there has been a delivery of the property, and full payment made in good faith, the right of the purchaser will not be interfered with; but if the purchaser has notice of the fraud before getting possession and making the payment of the consideration, the creditor may intervene, and the contract will be set aside. In the present case, it is not controverted that John B. Brownrig and E. M. Parrish each owed and were liable, individually, at the time of the sale to the plaintiff,

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for much more than they were worth ; but the plaintiff insists that the firm was not insolvent, and that if not insolvent, though the effect of the sale would be to defeat and defraud individual creditors, the sale is valid unless the plaintiff had knowledge that such would be the effect, and that the vendors intended a fraud. I do not see readily how this distinction can be made, if the jury shall find that the firm was not insolvent. The insolvency of the individual members of a firm is equivalent to the insolvency of the firm itself, since it is clear that the whole assets and property of the individuals are liable for the whole amount of the firm debts. In other words, I can not understand how a firm can be said to be solvent if there exists an individual indebtedness of its members which exceeds the entire assets and property of the firm. It is clear that a firm, with a knowledge that its members are individually insolvent, has no right, moral or legal, to dispose of firm property under circumstances that will render such disposition a fraud on the creditors of the individual members.

It will be for the jury to inquire: 1. Whether Brownrig & Parrish, individually and as partners, were in debt beyond their means of payment; 2. Whether the plaintiff, from all the circumstances in proof, is chargeable with notice of such insolvency. If the jury are satisfied of the insolvency of Brownrig & Parrish, there is a strong presumption of fraud, so far as they are concerned, in making the sale to the plaintiff. It is not intended to refer to all the facts connected with this sale. The inquiry for the jury will be, did Brownrig & Parrish intend by the sale of the property to put it beyond the reach of their creditors? In determining this inquiry the jury will look to the facts: 1. Were they insolvent? 2. Was the property they were to receive so situated as that it could be made available to their creditors? In connection with the last inquiry, the jury will very properly consider the fact that the convey-

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ances made by Stephen Parrish of the lands to be given by the plaintiff under the contract, were made to the wives of Brownrig and E. M. Parrish. This would seem clearly to justify the inference that the land was intended to be placed beyond the reach of creditors. If the jury are satisfied that there was a fraudulent purpose by Brownrig & Parrish in making this sale, their next inquiry will be, is the plaintiff chargeable with a knowledge of the fraud? It is insisted by plaintiff's counsel that plaintiff had been residing in a distant State for several years, and returning to Noble county, found Brownrig & Parrish in possession of a store, doing business, and in credit, and had no reason to suppose they were insolvent when he made the purchase, and is not chargeable with knowledge of the insolvency, or of any fraudulent intent in selling these goods. This subject has been so fully discussed that I will not detain the jury by restating the evidence. It will be for the jury to say whether, from all the facts, the plaintiff was a party to this transaction, with the knowledge that it would result in defrauding the creditors of Brownrig & Parrish. If they decide this affirmatively, it will result, necessarily, that the sale was fraudulent and void. If, on the other hand, the jury find the plaintiff had no grounds to conclude or suspect a fraud in the sale of the goods, and that he has paid a good consideration for them, the sale, so far as he is concerned, may be sustained. The plaintiff's knowledge can only be deduced from the circumstances of the case; but may be so presumed if the facts justify it. It is, however, insisted that the plaintiff was himself insolvent and unable to give or pay any fair consideration for the goods, and that thus he had no right to make the purchase, and that it was a fraud on his part to make such purchase. The court will not refer to the evidence on this point, but will say that if the plaintiff was insolvent at the time of the purchase, it would be a clear indication of fraud on his part. The jury will remember the evidence on this subject. It would appear that he has dealt largely in western lands,

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and has laid out a city in Iowa. Deeds have been produced showing the legal title to these lands to be in his brother, Stephen Parrish. It is claimed, however, that the land is really the plaintiff's, and that it is of value. If the jury find a fraudulent intent by the parties to this sale and purchase, that is, a design to defraud creditors, the fact that a full consideration was paid will not make it valid. If the jury find the defendants trespassers, they will give such damages as they think just. The damages should be the value of the property taken from the plaintiff, and the expenses and trouble in prosecuting this suit. If the jury believe that the sheriff and those whose assistance he required have acted in a wanton and oppressive manner, they may give exemplary damages. If the jury believe that in issuing the writs of attachment, or in any other proceedings connected with this transaction, the defendants, or any of them, have been parties to a combination or conspiracy to injure the plaintiff, it may justly form an element in the assessment of damages.

The jury returned a verdict for defendants.

(DISTRICT COURT.)

JAMES W. MILLS ET AL. v. THE STEAMBOAT NATHANIEL HOLMES.

Where damage is done by a boat in motion to one lying at a wharf, the presumption of wrong is against the moving boat, and to avoid liability it must appear that the greatest caution and vigilance were observed.

Ordinary care under such circumstances will not protect the boat which commits the injury from responsibility.

No inference of negligence can be deduced from the fact that a steamboat lying at a wharf has a loaded barge alongside of her.

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It is a paramount law of navigation that collisions are always to be avoided when it is practicable to do so, and the fact that one boat is in fault, will not justify another in the infliction of an injury that could have been avoided by the observance of proper skill and care.

In determining the question of fault with the view to the ascertainment of liability for an injury, the proximate cause of the injury must be regarded.

Lincoln, Smith & Warnock, for libellants. :

E. Mills, for respondents.

OPINION OF THE COURT:

This suit is prosecuted by the libellants, the owners of the steamboat Cuba, against the owners of the steamboat Nathaniel Holmes, to recover damages for a collision, caused as alleged by the sole fault of those having charge of the Holmes. It is not the usual case of an injury produced by colliding boats in motion, in which truth is often buried deep in a mass of conflicting evidence, and in which it is a hopeless task to ascertain where the fault lies. There is, in fact, very little difficulty in coming to a conclusion upon the evidence, and the main duty of the court is to determine the legal liability of the respondents upon the state of facts as proved. In this aspect of the case, it will not be necessary to notice specially the allegations of the parties in their pleadings, or to attempt an analysis of the great mass of depositions which have been submitted by the parties.

The material facts involved in the case, and which it may be assumed are substantially proved by the evidence, are that about nine o'clock in the evening of December 4, 1856, the Cuba, a stern-wheel boat, then one of a line of packets running between Louisville and Nashville, in an upward trip, reached the landing at Smithland, on the Ohio river, a short distance below the mouth of the Cumberland, and was lying at the wharf-boat, its bow being on a line with the upper end of the wharf-boat, in the act of receiving freight for Nashville and other points on the Cumberland.

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A barge laden with coal, belonging to the owners of the Cuba, was lashed to the outer or larboard side of the steamer and in close proximity to it. The wharf-boat was two hundred and thirty-seven feet in length, and the Cuba with its wheel about one hundred and seventy feet, thus leaving an unoccupied space at the lower portion of the wharf-boat, including a gangway, of about sixty-seven feet. The Cumberland river was at a high stage and there was sufficient depth of water along the whole line of the larboard side of the wharf-boat to enable a steamer of the largest size to land without danger of getting aground. It was a clear starlight night, the wind blowing somewhat fresh, but not with such violence as to render navigation difficult or dangerous. There were lights on the wharf-boat, and also the usual lights on the Cuba. The steamer Holmes in passing up the Ohio between ten and twelve o'clock in the night mentioned, had occasion to land at Smithland for the purpose of putting out some passengers. The object of the pilot or master was to bring the Holmes in contact with the barge lying alongside of the Cuba, and thus enable the passengers to get ashore. In this attempt the bow of the Holmes first struck the barge, but was carried out into the stream by the action of the current or some other cause and swung round, and the boat was again brought "head on" against the barge. The passengers were landed and the Holmes proceeded immediately up the river.

It appears very satisfactorily from the testimony, that some pieces of timber or scantling, which had formed a part of the frame work of a flat-boat some five or six feet in length, had been carried by the current and were lodged under the larboard guard of the Cuba and at a right angle with it, and were thus lying between the steamer and the barge. By the force of the blow of the Holmes in striking the barge, the ends of these timbers or scantling, which were some four or five inches square, were driven with such force against the hull of the Cuba that they penetrated the planks which were two and a half inches in thickness,

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thereby making three separate holes or openings between the knuckle kelson and the binding streaks and the upright ribs or timbers of the hull of the boat. Through these openings the water entered freely and with great force. The proof establishes the fact, that all reasonable efforts were made by the officers and crew of the Cuba to stop the inflow of the water, but in this they were unsuccessful. And the boat, having broken the lines by which it was made fast to the shore, floated from the wharf, and sunk in deep water some distance below.

The cargo of the Cuba, it seems, was nearly all transferred to the barge before the boat sunk, and what remained in the boat was reclaimed without material injury. There is, therefore, no claim in this action for damages in the loss of cargo. The boat was raised some time after the collision at an expense of \$2,800, and was subsequently sold for \$3,680, leaving to the owners, after deducting incidental expenses, the sum of \$584. They claim as damages the value of the boat at the time of the injury, subject to the deduction of the net proceeds of sale.

The answer of the respondents denies that there was any fault or negligence in landing the Holmes, and affirms that they were in no way responsible for the injury sustained by the Cuba.

The outline of the case, thus briefly presented, is sufficient to indicate the only points for the decision of the court. That a serious injury has been sustained by the libellants there can be no doubt; and the inquiry is whether the law applied to the facts will give redress for such injury.

The Cuba, at the time this injury was inflicted in the prosecution of its lawful business, was lying in its proper place at the Smithland wharf. And the decisions are numerous to the effect, that where damage is done by a boat in motion to one thus at rest, the presumption of wrong is against the moving boat; and to avoid liability it must appear that the greatest caution and vigilance was observed.

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Ordinary care under such circumstances will not protect the boat which commits the injury from responsibility. This principle is well illustrated in the case of *Culbertson v. Shaw et al.*, 18 Howard, 385. The action was brought to recover the value of a flat-boat and its cargo lost by a steamer coming in collision with it. The flat-boat was moored at the shore in a proper place when the injury was inflicted. The Supreme Court held, that the steamer was liable for the damage. Judge McLean, who delivered the opinion of the court, says: "When a steamer is about to enter a harbor, great caution is required. There being no usage as to an open way, the vigilance is thrown upon the entering vessel. Ordinary care under such circumstances will not excuse a steamer for a wrong done. A vessel tied to the shore is helpless. No movement can be made by it to avoid an entering boat; therefore the whole responsibility rests on such boat."

In the case of *Vantine v. The Lake*, 2 Wallace, Jr., 52, Judge Grier held, "that a vessel which moves alongside of another at a wharf or elsewhere, becomes responsible to the other for all injuries resulting from her proximity, which human skill or precaution could have guarded against."

Judge Parsons, in his treatise on Maritime Law, recently published, says: "If a ship at anchor and one in motion come into collision, the presumption is that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been. The rule of law would seem to be the same where a vessel aground is run into." 1 Parsons' Mar. Law, 201.

And in the case of the *Lochilbo*, 3 W. Rob. 310, Dr. Lushington says: "As the *Lochilbo* ran into a vessel (at anchor), which was incapable of helping herself, it is her duty to prove, in order to exonerate her from blame, that the collision arose from circumstances which it was utterly out of her power to prevent, or that it was the fault of the

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pilot on board, or that it arose from the default of those on board the Aberfoyle."

There are numerous other cases and authorities in support of the doctrine stated, which it is unnecessary specially to notice. I pass, therefore, to the inquiry, whether the present case falls within the operation of this principle; in other words, was every possible precaution used by those in charge of the respondents' boat to avoid a collision.

That the Holmes was in fault, under the circumstances of the case, in attempting a landing against the barge of the Cuba, seems to admit of no doubt. As before stated, there was an unoccupied space of sixty-seven feet in the lower part of the wharf-boat, within which a landing could have been effected by the Holmes without the danger of coming in collision with the Cuba or the barge attached to it. There is some evidence to the effect that it was proper and according to the usages of navigation for the Holmes to land at the barge for the purpose of discharging passengers, but the weight of the evidence is, that it was not only practicable, but safer to have landed on the wharf-boat. There was ample room for this purpose, and there is not the remotest probability that any injury would have resulted if this course had been pursued. That it was practicable, as well as safe, is proved by the fact that the steamer Winnifrede came up immediately after the Holmes, and made a landing on the wharf-boat without difficulty and without injury.

But the Holmes was guilty of a still more inexcusable fault in not observing due care and caution in the manner in which the landing was effected. On this point, much testimony has been taken by the parties, and there is some apparent conflict in their statements. The witnesses for the libellants state strongly and without hesitation, that the Holmes in landing struck the barge with unusual force. A large proportion of these witnesses were either passengers on the Cuba, or employed on the wharf-boat, having no connection with the Cuba, and with the

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most favorable opportunity of knowing the character of the landing made by the Holmes. There is no ground for the supposition that these witnesses were under any mistake as to the facts to which they have testified, or that they have not stated those facts with fairness and candor. Nor does it follow, as a necessary inference, that the witnesses for the respondents who state that the landing of the Holmes was not with unusual force have corruptly falsified the facts. They were on the moving boat at the time, and the shock of the collision would not be so sensibly felt by them as those who were on the boat which received the blow.

But apart from the evidence of the witnesses referred to, as to the landing of the Holmes, there are other facts showing conclusively the great force with which that boat struck the barge of the Cuba. It is in evidence that the lower end of one of the fenders on the Cuba was broken off by the force of the blow, and, moreover, that several of the stanchions of the Holmes were shattered. But more conclusive still is the fact before referred to, that the timbers or scantlings were driven through the planks of the Cuba. No supposition is reconcilable with this result, than that the Holmes came against the Cuba's barge with very unusual force. Nor can the conclusion be avoided, that there was a want of caution and vigilance in making the landing, that throws upon the Holmes the responsibility resulting from the collision.

An attempt has been made by the respondents to prove negligence or want of due caution on the part of the Cuba, to protect them from liability. But the evidence fails entirely to sustain this point. It is insisted that the Cuba was in fault in having a loaded barge alongside at the Smithland wharf. The proof, however, does not show that this was a violation of any of the usages of navigation; nor can the court see anything in the fact from which any inference of negligence can be deduced. The respondents also insist that the libellants' boat was not provided with a sufficient number of fenders for protection against collision,

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and other accidents of that character. The proof is not clear that the Cuba had more than three fenders on the larboard side, at the time of the collision, but in this connection it is proved that fenders are not regarded as necessary on boats navigating the Cumberland river. This, however, can not be viewed as material in this case, as fenders are used for the protection of the guards of the boat, and are of no avail for the protection of that part of the hull of a steamer in which the injury in question was sustained. Equally unavailing is the defense set up, that the Cuba was deficient in strength to meet the perils of the navigation in which it was employed. The evidence, however, is, that the boat had been thoroughly overhauled and repaired a few weeks only before the collision, and was then as staunch and sound as boats of the same class usually are in that trade.

But the defenses indicated, if fully sustained by the facts, are not available to the respondents in this action. It is a paramount law of navigation, that collisions are always to be avoided when it is practicable to do so; and the fact that one boat is in fault will not justify another in the infliction of an injury that could have been avoided by the observance of proper skill and care. The Cuba was entitled to protection from a wrongful act on the part of the Holmes, even if fault or negligence could be imputed to the former. If it be conceded that the barge was improperly at the side of the Cuba, or that there was a deficiency of fenders, or that the boat was weak and frail in its structure, no one or all of these facts would afford a justification for the wrong-doing of the Holmes. The law is well settled that in determining the question of fault with a view to the ascertainment of liability for an injury, the proximate cause of the injury must be regarded. And, in this case, if that proximate cause is found in the improper attempt of the Holmes to land at the Cuba's barge, instead of the wharf-boat, or the inexcusable violence with which it was landed against the barge, the respondents are not shielded from liability

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by proof of negligence or fault on the part of the other boat which had no connection with the act which produced the injury. The law on this subject is well stated by the Supreme Court of Vermont in the case of *Trow v. Central R. R. Co.*, 24 Vermont, 487, in these words: "Therefore, if there be negligence on the part of the plaintiff, yet, if at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury." There are many other cases which sustain this view of the law, to which I will merely refer, without specially noticing them. 27 Missouri, 95; 4 Ohio St. 476; 3 Ohio St. 195.

Upon the whole, I can see nothing in the facts or the law of this case to shield the respondents from liability for the injury sustained by the libellants in the loss of their boat. There was certainly great fault, if not positive recklessness in the landing made by the Holmes, which was the immediate cause of the injury. And it is equally clear, that no negligence is attributable to the Cuba, which can justify the misconduct of the other boat, or which calls for a division of the damages on the ground of mutual fault.

The weight of the testimony on that point shows the value of the Cuba to have been \$10,000. The net proceeds of the sale of the boat being deducted from this sum, a decree will be entered for the balance, with interest at six per cent. from December 4, 1856.

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(CIRCUIT COURT.)

**RUFUS S. LEE AND WILLIAM D. LEAVITT v. HENRY BLANDY
AND FREDERICK J. L. BLANDY.**

A certified copy of an assignment from the Patent Office is *prima facie* evidence of the genuineness of the original, and may be read in evidence to the jury.

A former license from the plaintiff to the defendant to use the patented machine is evidence of the utility of the invention.

There can be no question but that there may be a claim for two inventions in the same patent, if they both relate to the same machine; and an action can be sustained for the infringement of either, when they are claimed as separate and distinct.

There are two classes or kinds of combination recognized by our patent laws which are properly the subject of a patent.

The first is one in which all the parts were before known, and where the sole merit of the invention consists in such an arrangement of them as to produce a new and useful result.

The second is where some of the parts or elements of the combination are new, and their invention is claimed, but where they are used in combination with parts or elements that were known before.

There is no infringement of a combination of the first class unless the defendant has used all the elements; but the second class may be infringed by the use of a part, if it is new and the invention of the patentee.

The patentee is protected against any device which involves substantially the same principle as his own; but if another party produces the same result by means different in principle and application, then it is no infringement, for it would be absurd to say that the granting of a patent covers all possible ways of producing the same result.

Norcross claimed "the application to circular saw frames of rocker boxes and a swing frame, as herein set forth, and suspending said frame in position by means of the driving belt, as above described, for the free and successful operation of the saw by the motion before mentioned."

Held, that this was a claim for a single combination of rocker boxes, swing frame, and suspension of the frame by the driving belt, and not a claim for two separate improvements.

THIS was an action on the case, tried by the court and a jury, to recover damages for the alleged infringe-

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ment of letters patent for an "improvement in hanging circular saws," granted to Nicholas G. Norcross, January 15, 1850, and assigned to plaintiffs March 28, 1856.

In his specification the inventor says:

"The nature of my invention consists in suspending the saw so that it can have lateral vibration, and when thrown out of line will recover itself by the action of the driving belt, and the arrangement of the parts by which it is sustained, while at the same time the arbor has no lateral play in its boxes, and is made to fit close with shoulders, to prevent the oil from getting out while in operation—a matter of great importance when the motion is so rapid as in circular saws. This is effected by supporting the boxes in which the journals of the arbor run upon standards, to which said boxes are jointed, and which are themselves jointed to the foundation to which they are attached, so that the arbor is kept horizontal, while it is allowed a sufficient lateral play, the motion being a curved line, and of course, inclining downward as the tops of the standards recede either way from a vertical position. To sustain the frame upright, the driving belt passes around the pulley on the arbor, up over a driving pulley above, and thus holds the frame up to the proper point, so that the saw is actually suspended by the belt, while it is kept steady and made to move properly by the frame below. By this arrangement it will be seen, that while the slightest force will cause the arbor to deviate a little laterally the constant tendency of the reacting agent is to bring it back to place again. By this means I am enabled to use a much thinner saw, and save material and power to a great degree. . . .

"What I claim as my invention, and desire to secure by letters patent, is the application to circular saw frames of rocker boxes and a swing frame, as herein set forth, and suspending said frame in position by means of the driving belt, as above described, for the free and successful operation of the saw by the motion before mentioned."

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The plaintiffs claimed that these specifications described in effect two distinct improvements in the circular saw. First, permitting the lateral motion of the saw mandril, or arbor, by the device of the rocker boxes and swinging frame, and second, restoring the saw to line by the elasticity of the belt acting as a reacting agent.

The defendants gave the saw arbor end play in its boxes, and did not use the swing frame, but, in order to restore the saw to line, they placed a metallic spring in a box at the end of the mandril, so that when, from any cause, the mandril was deflected, the spring would throw it back to place again. The plaintiffs claimed that the elasticity of this metallic spring in the defendants' machine was an equivalent for the elasticity of the belt in the plaintiffs'; in other words, that both were in effect springs, and that the defendants had thus infringed the plaintiffs' patent by using their second improvement.

One or two preliminary rulings were of interest. The plaintiffs offered a copy of the assignment of Nicholas G. Norcross to them of his rights under the patent, for the State of Ohio, with a certificate of the Patent Office, showing it to be a copy of the record of what purported to be the original assignment. The defendants objected, first, because there was no proof of the validity of the original assignment, and second, because the plaintiffs must be presumed to be in possession of the original assignment to them, and, therefore, a copy was not the best evidence.

The court overruled the objection, and held that the certified copy was *prima facie* evidence of the genuineness of the original, and permitted it to go to the jury.

At a later stage of the case, the court held that a contract which the defendants had formerly made with the plaintiffs, for the right to use their machine, might go to the jury as evidence of the utility of the Norcross invention.

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G. M. Lee and S. S. Fisher, for plaintiffs.

C. D. Coffin and A. G. Thurman, for defendants.

CHARGE BY THE COURT:

On January 15, 1850, a patent was issued to Nicholas G. Norcross. The improvement for which he received the patent is designated "an improvement in hanging circular saws." On March 28, 1856, Norcross, the patentee, assigned his rights for the State of Ohio, and eight other States, to the plaintiffs, Lee and Leavitt.

This suit is brought for an alleged infringement of the plaintiffs' right, in the making and selling of a number of circular saws, which, the plaintiffs claim, embodied a material element of the improvement patented to Norcross.

A great and important question, involving the construction of the patent, has been made and argued with great force. That is a question exclusively for the consideration of the court, and however anxious I might feel to avoid that legal proposition, and to present the whole case to the consideration of the jury, the position I occupy and the duties that devolve upon me require me to deliver an opinion upon it.

On the part of the plaintiffs, it is contended that Norcross' invention consists of two separate improvements. First, the use and application of rocker boxes and a swinging frame to produce lateral motion of the saw; second, the action of the belt by the force of elasticity, in connection with the pulleys, to restore the saw to line when deflected from its right course.

These are claimed by the plaintiffs' counsel as separate and independent improvements, and as being both covered by the claim of Norcross. They claim that defendants have infringed the Norcross patent by the use of the spiral spring in the end of the mandril, the office of which is to restore the saw to line, which spring is claimed to be a mechanical equivalent for the belt in connection with the rocker boxes and swinging frame.

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The defendants' counsel insist: First, that the invention of Norcross, as set out in the patent, is a *combination of rocker boxes, swinging frame, and suspension of the frame by the driving belt*; they insist that these elements are claimed as an entire structure or machine, and that there can be no infringement unless the defendants have used all the parts or elements of it. They do not use the swinging frame or rocker boxes, and therefore do not infringe. And secondly, they insist that their metallic spring is not the same or an equivalent for the belt and its connections in the Norcross invention.

The latter question, that of identity of the two inventions, is, of course, a question for the jury, and I do not propose, in this place, to say anything upon it, but will ask your attention to the propositions of law in regard to the construction of the claim of this patent.

There can be no question but that there may be a claim for two inventions in the same patent, if they both relate to the same machine or structure; and an action can be sustained for the infringement of either one or the other of these separate inventions, where claimed as separate and distinct in their character. There can be no doubt, if one of these be infringed it is properly a subject for an action. The question, in this case, is, whether the claim is of this character—whether it is, in fact, a claim for two distinct and independent inventions, or whether it is a claim for a combination. If a combination, what is the character of that combination?

There are two classes or kinds of combinations recognized by our patent laws, which are properly the subject of a patent. The first may be defined to be one in which all the parts were before known, and where the sole merit of the invention consists in such an arrangement of them as to produce a new and useful result, or where, by adopting parts of a machine which may have been known for ages, an inventor has succeeded in making such an arrangement of them as that they produce a result never before obtained,

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and have, in that point of view, the merit of originality, and are, therefore, patentable.

There is another class of combinations, where *some* of the parts or elements of the combination are new, and their invention claimed, but where they are used in combination with parts or elements that were known before.

It is well settled that a patent may be obtained for the first class of combinations, but it is a principle well recognized that there is no infringement unless the party has used *all* the elements. If the combination consists of A, B, C, three mechanical structures long known, and if the party sued has only the parts B, C, and not A, he is not regarded as an infringer; he must use all to subject himself to liability.

If the combination have the other character to which I have referred, being, to a certain extent, new, but embracing some old parts or elements, then there is an infringement by the use of that part which is new and the invention of the patentee.

In the present case, there is no claim or pretense that these defendants use the swinging frame and rocker boxes in their saw-mill; and, therefore, if the Norcross claim is to be viewed as for a combination, without anything new, it would result that defendants have not infringed by their method of producing lateral motion, and of restoring the saw by the use of the spiral spring.

The language of the patent seems, in my judgment, to contemplate a machine made up of a combination of different parts, all necessary to its harmonious working, as a unit. It seems hardly possible to resist the conclusion, that the machine was arranged and constructed so as to produce lateral motion, and the restoration of the saw into line in case of divergence. There is no intimation that any one of the appliances are separate and independent inventions. I am obliged to state as my view of the proper construction of this patent, that it claims a structure or machine in combination, or composed of a combination of different elements. There is certainly great force in the idea that the

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patentee could not have claimed the belt *per se* as a novelty, and that it could only be claimed in combination with the rocker boxes and swinging frame, for it is only in connection with them that the belt could act as a restoring agent; and this would seem sufficient to show that it was not contemplated as a separate invention, but as one of the parts of the entire combinatio .

These are the views I have felt it my duty to give the jury upon the question of combination. I have regretted somewhat that I have been brought to this conclusion, as I am very desirous, independent of any legal question of this kind, growing out of this specification, that the jury should take the entire case upon the facts, untrammelled by anything of this kind, and pass upon the merits, and I should be glad that it might be understood, even now, that the jury should take this case and consider it upon the question of identity, infringement, and utility. I do not understand it to be claimed that, except in the use of the equivalent of the spring for the belt, there is any infringement.

Upon the question of infringement I had not intended to say a word. The evidence has been full upon all questions of fact, and has been extensively commented upon by counsel. I shall not, therefore, go into the consideration of what has or has not been shown by the evidence.

Upon the question of identity I will, however, remark that it is not a question as to the precise form or size; the point is, whether the principle of the two things is the same or not. The law is that the patentee is protected against any other device which involves substantially the same principle. But if another party produces the same result by means different in principle and application, then it is no infringement, for it would be absurd to say that the granting of a patent covers all possible ways of producing the same result. Such is not the intention and spirit of the patent law. On the subject of the identity of these two contrivances, I need not extend my remarks. The jury have had the benefit of models and the testimony of wit-

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nesses, besides the explanation of counsel. They are entirely posted upon the character and features of the two inventions. In regard to the evidence of witnesses upon that point there is diversity. A number of intelligent witnesses, some of them experts, say that the contrivances are, in principle, the same; another large number, equally intelligent and capable, say they consider the two different in their action. It will be for the jury to reconcile the evidence, and come to such result as they shall think proper.

Some question has also been made in the course of the case upon the question of utility. Some evidence has been adduced to show that the lateral motion provided for, is really of no utility. On this subject I have only to remark, that the general doctrine is undoubtedly as stated, that there is a presumption arising from the patent itself, that the invention is of some degree of utility; but that it is not conclusive, and the other party may show that it is useless and worthless. You will remember upon this point there was some diversity of opinion. Some of the witnesses have stated not only that they considered it of no benefit, but a disadvantage. I would state that, if the jury find a substantial identity, it does not lie in the mouths of the defendants to say that the machine they use is of no utility, that is, upon the hypothesis that if there is identity, it does not become them to say that what they have appropriated is of no utility, as the mere fact that they have appropriated it, is evidence that they regarded it as of utility.

The jury found a verdict for the defendants.

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(DISTRICT COURT.)

McALLISTER AND CO. v. STEAMBOAT SAM KIRKMAN.

CARONDOLET MARINE RAILWAY AND DOCK CO. v. SAME.

BERNARDINO FLORENS v. SAME.

SPENCER J. BALL v. SAME.

Credit given for supplies furnished a steamboat in her home port, is presumed by the maritime law to have been given to the owner or master, and not to the boat.

A claim for wages being a lien on the boat, under all circumstances is an exception to the general rule. Where persons in good faith have given credit to a steamboat for necessary supplies and repairs, as a foreign boat, such persons are not affected by the fraudulent character of sales or transfers by which the boat was placed in the position of a foreign boat.

If such persons were apprised of the real nature and character of the transfers, or are fairly chargeable with such knowledge, they must be viewed as participants of the fraud, and can have no claim to any benefit resulting from it.

Whatever may be the character of a transfer of an interest in a steamboat, it vests in the purchaser a legal title in that interest, which those dealing with the boat are justified, in the absence of any knowledge to the contrary, in regarding as *prima facie* valid and unimpeachable.

A collector's office, where bills of sale are made matters of record, is the place where alone it may be presumed persons dealing with a boat would search for information in regard to a title.

The place of enrollment is not conclusive as to the home port of a vessel or boat, and evidence is always admissible to prove the actual residence of the owner, and such evidence furnishes the test of the character of the boat as foreign or domestic.

The supplies of material-men to a ship belonging or represented to belong to owners residing in another State, are to be deemed to be furnished on the credit of the ship and the owners until the contrary is proved.

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The clerk of a steamboat has no power to bind the boat for a loan of money without the authority of the master for his acts.

If the clerk procures money on the credit of the boat without the sanction of the master, and the master directly or impliedly assents to it, it will be regarded as the act of the master, and a lien will be created.

A pilot on a steamboat who assents to an arrangement by which another person agrees to account to him for his wages, does not by so doing, waive his maritime lien on the boat.

A maritime lien is equivalent to an express hypothecation of the boat, and all subsequent transfers or changes of title are subject to this prior and paramount lien; nothing but payment will discharge the boat from its operation.

Under the constitution of the United States and the legislation of Congress, jurisdiction in the enforcement of maritime liens is vested exclusively in the national judiciary.

Credits given to a boat in the progress of construction are not liens by the general maritime law.

The purchaser of a boat sold by order of a State court, takes it subject, in his hands, to any lien or interest existing in favor of other parties prior to his purchase.

Lincoln, Smith & Warnock, for libellants.

Dodd & Huston and *Taft & Perry*, for respondents.

OPINION OF THE COURT:

The above-named libellants have set up claims against the steamboat Sam Kirkman, in separate libels filed in this court. The claim of McAllister & Co. is for stores and supplies furnished for the use of the boat at St. Louis, between November 9, 1857, and October 7, 1858, amounting to \$1,818.84. The claim of the Carondelet Marine Railway and Dock Company is for repairs to the boat, near St. Louis, in the month of September, 1858, amounting to \$710.10. The third claim is that of Bernardino Florens, amounting to \$1,500, for money advanced or loaned by him at various times between April 22, 1858, and May 12, 1858, for the use of the boat in payment of wages and the purchase of supplies. The libellants aver, respectively, that the supplies furnished, the repairs done, and the money advanced, were necessary in the navigation and business of

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said boat; that during the time within which these several claims accrued, the Kirkman was owned by John H. Throop, a resident of the State of Kentucky, William H. Cropper, a resident of the State of Ohio, and John D. Montgomery, a resident of the State of Virginia; that the credits were given to the boat, and not to the owners, and that the supplies, repairs, and money could not have been procured at St. Louis, on the credit of the owners; and that they have an admiralty lien for the same.

The libel of Spencer J. Ball asserts a claim for \$210.90, for wages due him for services as pilot, rendered in the month of February, 1858. As this claim stands on a different footing from the others, and does not involve the same questions, it will be hereafter separately considered.

In the first three of the foregoing cases the grounds of defense set up are: 1. That the libellants have no maritime liens, which can be asserted and recognized in this court. 2. That the boat, prior to the commencement of the proceedings in this court, had been attached by process from the McCracken county equity and criminal court, being a court of the State of Kentucky, in accordance with the statute of said State, and was not therefore subject to the jurisdiction of this court, as a court of admiralty, at the time of her seizure and arrest.

John V. Throop, as master and claimant of the Kirkman, and in behalf of D. A. Givens, as owner, has filed an answer in said cases, averring, in substance, that the boat, during the period within which said claims severally originated, was duly enrolled at the custom-house at St. Louis, and that John H. Throop, a resident of the State of Kentucky, was the owner of an interest of one-third, and Benjamin T. Beasley, a resident of St. Louis, the owner of two-thirds of said boat, and as the managing owner, had the sole control of the boat, at that point; and that during all said period, St. Louis was the home port of the boat; and that therefore the said libellants have no admiralty lien. The answer of Throop also admits the sale or trans-

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fer of the interest held by Beasley, first to William H. Cropper, and subsequently to John D. Montgomery, and avers that the same were colorable and fraudulent, and that Beasley continued to be the true and real owner of an interest of two-thirds in said boat, and was so at the times when the claims of the libellants respectively accrued.

The answer of Throop further sets up the proceedings in the Kentucky court, before referred to, in bar of the jurisdiction of this court. D. A. Givens has also filed an answer, asserting, among other things, that he is the sole and legal owner, by a purchase of the boat at a public sale, under the order of the Kentucky court, prior to her seizure by the process of this court. He adopts, substantially, the answer of Throop, as his defense to the claims of these libellants.

The testimony and exhibits in the case are voluminous, and can not be noticed in detail. The material facts necessary to the consideration of these cases may be summarily stated as follows: The Kirkman was built and equipped at Paducah, in the State of Kentucky, at the cost of about twenty thousand dollars, by the said John H. Throop and Benjamin T. Beasley, during the spring and summer of 1857; and commenced running the latter part of August in that year. Throop was the owner of one-third, and Beasley of two-thirds; Throop residing at Smithland, Kentucky, and Beasley at St. Louis, Missouri. In the progress of the construction and equipment of the boat, the owners incurred debts in Kentucky to the amount of about \$10,000, for labor and materials, and loans and advances made, in her construction and equipment. It is admitted that by the statute of Kentucky, on that subject, these creditors had liens on the boat for their respective claims. On December 4, 1857, some three months after the boat had commenced running, a part of the Kentucky creditors applied by petition to the court of McCracken county, under the statute of the State, for an order for the attachment of the boat, and she was seized at Paducah on the

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same day by the sheriff, under such order. On the 10th of December, by the consent and agreement of the petitioning creditors, the boat was released from the custody of the sheriff, on the bond of J. V. Throop, the master, stipulating for the redelivery of the boat to answer the claims of the creditors at whose suit she was attached. Under the command of Throop, as master, the boat immediately commenced running, making trips to and from St. Louis, on the Tennessee, the Ohio, the Missouri, and Osage rivers, until October, 1858, when, by the order of Throop, the master, and without the consent or knowledge of the owners, she left St. Louis where she had been lying in the night, and was taken to Paducah, and there surrendered to the sheriff of McCracken county. It will not be necessary to refer minutely to all the proceedings in the Kentucky court, as set forth in the long and complicated record, which is in evidence by the respondents. It appears that after the return of the boat to Paducah, probably on October 18, 1858, she was again attached at the suit of certain Kentucky creditors; and being in the custody of the sheriff, on his affidavit that no one had offered to bond the boat, that great expense was incurred in keeping her, and that she was liable to deterioration in being kept in custody, an order was made for the sale of the boat; and on the 6th of November following, pursuant to such order, she was offered at public sale, and sold to the said D. A. Givens for \$5,500, he giving his notes for the purchase money, payable on time. These notes are not yet paid; it appearing that Givens has declined payment until a decision shall be had in the libels filed in this court. The boat was enrolled at Paducah, immediately after the sale to Givens, and was run by him as owner until February 10, 1859, when, being at the port of Cincinnati, she was seized by the marshal on process from this court.

The first question to be considered is: Have these libellants a paramount admiralty lien for the claims asserted by them in this court? If St. Louis, the place where these

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claims originated, was the home port of the steamboat during the time the credits were given, it is clear there is no such lien. In that case the maritime law goes on the presumption that the credit was to the owner or master, and not to the boat. A claim for wages being a lien on the boat under all circumstances, is an exception to the general rule.

As before stated, the libellants aver that their claims for supplies, repairs, and money loaned, are liens, for the reason that the credits were to a boat, which, as to them was a foreign boat, and were necessary to her successful navigation. It is also averred that these credits could not have been procured, except on the supposition that there was a lien on the boat. And the evidence is entirely conclusive, that the credits were all given on this supposition and belief, and that neither Cropper nor Montgomery could have obtained credit at St. Louis for any considerable amount on their personal responsibility. The witnesses who prove these several claims, state explicitly that Cropper and Montgomery were without credit at St. Louis, and that the necessities of the boat could not have been supplied on their personal pledge or undertaking. This is substantially admitted by the respondents, and it is therefore unnecessary to refer specially to the evidence on the point. But it is insisted by the respondents, that Cropper and Montgomery were not the owners, in fact or in law, during the time these claims originated, and that for the purposes of the present case, Beasley was owner of a two-thirds interest, and being a citizen and resident of St. Louis, that place must be held to be the home port of the boat.

That the transfer or sale by Beasley to Cropper, and afterward to Montgomery, was merely colorable and fictitious, as between the parties, there is no reason to doubt. The design of Beasley clearly was to place the ownership of the boat in persons not residents of Missouri, that credit might be obtained at St. Louis for the Kirkman as a boat foreign to that port. Beasley was laboring under pecuniary

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embarrassment, and could not have procured credit on his personal responsibility, to meet the wants of the boat, in the prosecution of her business. He therefore transferred his interest to Cropper, a resident of Ohio, and wholly without pecuniary means, for the sum of \$14,000, for which his notes were given, payable on time. Beasley executed to him a bill of sale, in due form, which was recorded in the office of the collector, at the port of St. Louis, and an enrollment of the boat there made, on the oath of Cropper, that he was the owner of two-thirds of the boat, and that Throop was the owner of the other third. In February, 1858, at the request of Cropper, and without the payment of any part of the purchase money, this sale was virtually annulled, and John D. Montgomery, also a young man without property, whose residence was in the State of Virginia, was substituted in the place of Cropper, and gave his notes for the purchase money, and Cropper's notes were given up. It appears that Beasley, after parting with his interest in the boat, continued to represent the interests of the boat, and transact business for her at St. Louis. After the transfer to Montgomery, he acted as her agent, under a power of attorney from him.

In the view taken of the question before the court, it seems wholly unnecessary to remark further upon the sale by Beasley. Its real character is too patent to justify discussion. As between Beasley and his creditors, no court would hesitate to pronounce it fraudulent and void. But what shall be its effect on the rights of these libellants, now asserting a lien on the boat as foreign to the port of St. Louis, is a wholly different question. And it would seem not to admit of doubt, that if the libellants in good faith, and acting on the belief that the boat was owned by persons not residents of the State of Missouri, gave her credit for necessary supplies, repairs, etc., as a foreign boat, and with a view to a maritime lien for their security, they are not affected by the fraudulent character of the sales or transfers by which the boat was placed in that position.

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On the other hand, it is equally clear, that if the evidence fairly warrants the conclusion, that they were apprised of the real nature and character of the transfer of Beasley's interest in the boat, or are fairly chargeable with such knowledge, they must be viewed as participants of the fraud, and can have no claim to any benefit resulting from it. And this presents the only question, involving doubt or difficulty, as to this branch of these cases. This question I have carefully considered, and am obliged to say, as the result of my deliberation, that I see no sufficient ground for finding, that the libellants are implicated in the fraudulent conduct of Beasley. There are facts in the case, which, perhaps, warrants a suspicion that McAllister and the Marine Railway and Dry Dock Company were cognizant of the real character of the sales by Beasley to Cropper and Montgomery. It is in evidence that there had been long-continued and somewhat intimate business relations between McAllister and Beasley. The firm of McAllister & Co. consisted of one person—McAllister—and was extensively engaged at St. Louis, in the business of supplying stores and necessities for steamboats; and Beasley, as a steamboat owner and agent, had dealt largely with the firm, and was frequently at its place of business. But there is no tangible or reliable fact in evidence showing that McAllister was advised of the character of the transfer by Beasley, by which his interest was legally vested in Cropper and Montgomery. The same remark applies to the claim of the Marine Railway and Dry Dock Company. McAllister was a principal stockholder in the company, and one of the active managers of its concerns. It is in evidence, too, that Beasley used his influence in having the boat taken to the dock of this company, for the purpose of repairs. But this, surely, does not make McAllister a partaker in Beasley's fraud. And there are some facts in the case which repel any unfavorable presumptions in regard to the claims just referred to. In the first place, it may be remarked that there is no controversy about the fairness and justice of the

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accounts of McAllister and the Railway and Dry Dock Company. The stores and supplies charged in the account of the former were furnished to the boat, at fair prices; and these stores and supplies have not been paid for; and there is no pretense that the Dry Dock Company did not make the repairs charged, or that the price charged is not reasonable. But this is not all. As before remarked, the proof is conclusive, that these supplies and repairs were necessary for the boat, and that as to both claims, credit was given to the boat, and not to the owners. It is not readily perceived why these credits could be regarded as imparting a maritime lien on the boat, on any other supposition than that the creditors supposed she was legally foreign in the port of St. Louis. Again: it is very clear that whatever may have been the character of Beasley's transfer of his interest, it vested in the purchaser a legal title in that interest, which those dealing with the boat were justified in the absence of any knowledge to the contrary, in regarding as *prima facie* valid and unimpeachable. The bills of sale were matters of record in the collector's office, where alone it may be presumed persons dealing with the boat would search for information in regard to title. The bill of sale from Beasley to Cropper is in the usual form, and bears date October 7, 1857. It sets out the residence of Cropper as being at Portsmouth, in the State of Ohio. It appears from Beasley's deposition, that the boat was enrolled at St. Louis by Cropper; and from an authenticated copy of his oath then made at the custom-house at St. Louis, it appears that he swore he was the owner of two-thirds of the boat, and that Throop was the owner of the other third. In this affidavit he also says that he is a resident of Portsmouth.

The facts in relation to the enrollment of the boat do not clearly appear from the evidence before the court. It is probable she was originally enrolled at Paducah, where she was built, but her enrollment there is only made out by inference and not by authoritative testimony. Nor is there any record evidence of an enrollment by Cropper at St.

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Louis after his purchase from Beasley. But, as before remarked, Beasley swears that she was enrolled there by Cropper, and that is probably the fact. I do not see that the place of her enrollment can have any bearing on the question which was the home port of the boat. The statute requires the enrollment to be at the port "at or near which the husband or acting or managing owner or owners of such ship or vessel, usually reside or resides." 1 Stat. U. S. 56, sec. 4.

But it has been often held, by our courts of admiralty, that the place of enrollment is not conclusive as to the home port of a vessel or boat, and that evidence is always admissible to prove the actual residence of the owners; and that such evidence furnishes the test of the character of the boat as foreign or domestic. In the case of the *Brig Nestor*, 1 Sumner, 75, Judge Story says: "*Prima facie*, the supplies of material to a foreign ship, that is, to a ship belonging, or represented to belong, to owners residing in another State or country, are to be deemed to be furnished on the credit of the ship and the owners, until the contrary is proved." And in the very able opinion of Judge Wells, of the United States Court for the District of Missouri—*Hill & Conn v. Golden Gate*, 1 Newberry, 308—it is said: "It is apparent, therefore, that the place of enrollment has nothing to do with the credit that is given, and, therefore, has nothing to do with the question of lien." Such, I may add, has been uniformly the decisions of this court, as to the effect of an enrollment. It is deemed unnecessary to refer to the numerous cases in which this doctrine has been held.

From the views thus indicated, it results: 1. That the supplies furnished by McAllister & Co., and the repairs made by the Carondelet Marine Railway and Dry Dock Company, as charged in their respective accounts, must be deemed on the evidence as necessary to the successful prosecution of the business of the boat. 2. That the boat, during the time these claims originated, must be held to be

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foreign at the port of St. Louis. 3. That the credits given by said libellants were given to the boat and not to the owners. 4. That although the conduct of Beasley and others connected with the boat, may have been reprehensible or fraudulent, these libellants in the absence of proof that they were cognizant of and participants in such conduct, are not affected by it.

But the claim of Florens, for money advanced for the use of the boat, is presented in a different aspect from those just referred to. In the first place, there are sufficient reasons for the inference that there was collusion between Beasley and Florens for a dishonest purpose. It is clearly proved that Beasley at different times withdrew from the earnings of the boat some \$4,000, which was not applied to the payment of her current expenses. Capt. Throop says, in his deposition, that Beasley once proposed that they should draw money from the boat, place it in the hands of some confidential friend, and receive it from him in the form of a loan to the boat, on her credit, and thus create a maritime lien on which proceedings could be instituted, and the boat forced to sale. Throop did not assent to this plan, regarding it as dishonest; but the evidence, I think, shows that Beasley to some extent acted upon it. It appears, as I understand the proof, that in one instance there is a charge on the boat books of \$405, for money received by him from the boat, and on the same day a due bill was given to Florens precisely for the same sum, as for money loaned by him. This is one of the items in the account of Florens. And the same coincidence occurred in relation to an item of \$250, also charged in his account. These facts, in connection with the evidence by Throop above referred to, and the further fact that it was upon the advice and suggestion of Beasley that the application for a loan from Florens was made, tend directly to implicate Florens as a participant in the intended fraud of Beasley.

But there is another stringent reason for the rejection of Florens' claim. The loans made by him to the boat were

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not authorized by or known to the master of the boat. Capt. Throop states not only that he did not authorize these loans, but that he had no knowledge of them until after the institution of the suits in this court. They were made, therefore, by the clerk of the boat, probably at the suggestion of Beasley, but wholly without the sanction of the master. Now, although it is true in reference to steamboats on the western waters, that the clerk is in some sense the financial agent of the boat on which he serves, his acts as such must be under the authority of the master, and he has no power to bind the boat for a loan of money without such authority. It is true, if the clerk procures money on the credit of the boat without the sanction of the master, and the master directly or impliedly assents to it, it will be regarded as the act of the master, and a lien will be created. But where, as in this case, the loan was not known to the master until long after it was made, there can be no presumption that he authorized it or gave his assent to it. On this ground, therefore, I think the claim of Florens must be rejected.

As to the claim of Spencer J. Ball, for wages as pilot, it is admitted by the counsel for the respondents, that it is a valid lien on the boat, irrespective of the question whether St. Louis was her home port. But, it is contended, that he has waived or released his lien by his assent to an arrangement by which Beasley agreed to account to him for the sum due. This applied to a part only of the sum claimed by him. There is no evidence, however, that Beasley has paid or accounted for any part of this claim. Ball is still the creditor of the boat, on her books, for the whole amount of wages claimed by him. It is clear, therefore, that there is no legal waiver or release of his lien on the boat, and that he is entitled to a decree if this court has jurisdiction in this case. The cases are numerous, in the books, in which it has been held that the taking of a promissory note is not a waiver of a maritime lien. It was so ruled by Judge Story, in the case of the *Barque Chusan*, 2

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Story, 455. And the same doctrine is distinctly affirmed by Judge McLean, in the case of *Raymond v. Schooner Ellen Stewart*, 5 McLean, 269. But it is quite needless to multiply references on this point. The law is too clearly settled to admit of doubt or controversy.

I will now briefly consider the question of jurisdiction, which is presented in this case. It is insisted, by the counsel for the respondents, that the attachment and sale of this boat by the order and authority of the Kentucky court, prior to her seizure under the process of this court, is a bar to any proceeding in admiralty founded on a claim originating before the sale under the State authority. If this position is well taken, this court has no jurisdiction, and these libels must be dismissed. The principle involved in the question has been so frequently considered and passed upon by judges and courts of the highest standing in this country, that it is quite unnecessary that I should discuss it at any length.

The facts necessary to notice, as applicable to the question, have been before sufficiently stated. From these, it appears the boat was attached in Kentucky at the suit of creditors at Paducah, by order of the court of McCracken county, in that State, on December 4, 1857, and held in the custody of the sheriff until the 10th, when, by the consent of the petitioning creditors, on a bond for her delivery to answer their claims, the sheriff gave possession to the master. She was afterward attached at Paducah, by the order of the same court, at the suit of other creditors, and again released from the custody of the sheriff, by giving bond as above stated. In charge of the same master, the boat continued to navigate the western rivers, carrying freight and passengers, making St. Louis her principal stopping place for business purposes, until the beginning of October, 1858, when she was taken to Paducah by the master, and placed in the possession of the sheriff of McCracken county. A few days after, she was, by the order of the Kentucky court,

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sold at public sale, and the claimant, D. A. Givens, became the purchaser. The claims now prosecuted in this court, as before noticed, originated at St. Louis, between the beginning of November, 1857, and the 18th of October of the next year.

If the court is right in holding that these libellants, with the exception of Florens, have a valid maritime lien on the boat, it is clear that no State legislation can supersede or annul it. By the well-settled principles of the maritime law, such a lien is equivalent to an express hypothecation of the boat, and all subsequent transfers or changes of title are subject to this prior and paramount lien. Nothing but payment will discharge the boat from its operation. And it is equally clear, that under the constitution of the United States and the legislation of Congress, the jurisdiction in the enforcement of maritime liens is vested exclusively in the national judiciary. In the case of the *Barque Chusan*, Judge Story held, that "the subject of admiralty and maritime jurisdiction is withdrawn from State legislation, and belongs exclusively to the national government and its functionaries." In the same case, the learned judge says: "The constitution of the United States has declared that the judicial power of the national government shall extend to all cases of admiralty and maritime jurisdiction, and it is not competent for the States to enlarge, or limit, or narrow it. In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof by the general principles of maritime law." 2 Story, 462.

And the Supreme Court of the United States, in the case of the *New Jersey St. Nav. Co. v. The Merchants' Bank*, say: "The exclusive jurisdiction in admiralty cases were conferred on the national government as closely connected with the grant of commercial power." 6 Howard, 392. But this doctrine has been so often affirmed not only by the Supreme Court, but by many other courts of the United

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States, and also by State courts of high position, that it does not require the citation of authorities to sustain it. It is now referred to as sanctioning the conclusion, that the statute of Kentucky can not have the effect of depriving these libellants of the full benefit of their maritime liens. These existed in full force before the purchase of the boat by Givens, and any right he acquired under that purchase was subordinate to them. The court in Kentucky had no power to adjudicate upon the rights of these libellants for the reason that it had no jurisdiction to enforce their liens; and if such power did exist, these libellants were not parties actually or constructively to the proceedings in that court, and their rights could not therefore be affected by its action. It will be apparent, then, that this is not a case of conflict of jurisdiction between the Kentucky court and this court, as courts of concurrent jurisdiction. The purchaser of the boat in the sale made under the order of the court in Kentucky did not acquire, and could not acquire the rights of these libellants in virtue of their paramount liens. This principle is recognized and asserted by Judge McLean in the case of *O'Callaghan v. Riggs*, in the Circuit Court of the United States for the District of Michigan, 5 Am. Law Reg. 189. It was also affirmed by the same learned judge in this circuit, on an appeal from this court, in the case of the *Steamboat N. W. Thomas*, not yet reported. See also *Ashbrook et al. v. Steamer Golden Gate*, 1 Newberry, 296.

The application of this principle to the cases before the court is in no way affected by the fact that the claims of the Kentucky creditors are for money, labor, materials, etc., in the construction of the boat; and, therefore, that their liens, under the State law, are prior to those of the libellants for stores, supplies, and repairs after the boat was completed, and while engaged in navigation. It is well settled, that credits to a boat in the progress of construction are not liens by the general maritime law, 20 Howard, 398; and if they were so, a State court would have no power to enforce them. This boat, after her seizure by the Ken-

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tucky creditors, was permitted to engage in carrying on commerce between the ports of different States; and thus engaged, she was undoubtedly subject to the operation of the well-known principles of the national maritime law. For the purposes of successful navigation, she needed credit in a port distant from the place of her construction, and such credit was given to the boat by persons who could not be presumed to know of any prior local liens, and whose rights could not therefore be affected by such liens. It is obvious that any other doctrine would seriously cripple the commerce and navigation of the western waters, and would virtually set aside the maritime law of the land as applicable to those waters.

The case of *Taylor et al. v. Carryl*, 20 Howard, 583, has been brought to the notice of the court, and it is insisted by the respondents' counsel that it is decisive against the jurisdiction of this court in the cases now under consideration. I do not so understand the opinion of the Supreme Court in that case. They decided that the District Court of the United States for the Eastern District of Pennsylvania never had the legal possession of the vessel which had been sold under its decree; and, therefore, that the purchaser under that decree acquired no title. As in a court of admiralty the possession of the *res* is the basis on which alone any subsequent proceeding has its warrant, it resulted necessarily in that case that there was a want of jurisdiction, and that the decree of the court was therefore a nullity. The Supreme Court say, in the conclusion of their opinion: "The view we have taken of this cause renders it unnecessary for us to consider any question relative to the respective liens of the attaching creditors and of the seamen for wages, or as to the effect of the sale of the property as chargeable or as perishable upon them." The court nowhere asserts in the opinion, that the jurisdiction in admiralty by the constitution of the United States is not exclusive in the courts of the United States, or that the legislation of Congress has limited that jurisdiction, except

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in so far as the reservation of the rights of parties to proceed at common law, may be regarded as a limitation. Nor do they reverse the principle often announced by the decisions of that court, that it is not in the competency of State authority to abrogate or supersede a maritime lien created by the national maritime law. The court undoubtedly affirm the well-established rule of law, that as to courts of concurrent jurisdiction, the court first acquiring jurisdiction will retain it free from any interference from any other court. And they also hold, that in admiralty as well as in cases at law, property in the actual custody of an officer under valid process, either from a State or federal court, is not subject to seizure or levy by process emanating from another jurisdiction. It is true, the learned Chief Justice Taney, in his very able dissenting opinion in the case, controverted this principle as applicable to cases where there was a prior admiralty lien. The majority of the court, from a laudable desire to avoid collisions with the State authorities, held that prior legal possession in a State officer withdrew the property from the jurisdiction of the admiralty court. It is not for me to make comments on the opinion of the majority of the court on this point; but it will imply no disrespect to the decision of that high tribunal to remark, what is undoubtedly true, that this doctrine of rigid non-intervention with State jurisdiction was not previously "supposed to apply in cases where its effect would be to deprive a party of a vested right under a clear admiralty lien."

But in my judgment, the decision of the Supreme Court in *Taylor et al. v. Carryl*, can not be viewed as having any application to the cases now under consideration. In that case, the vessel was in the actual custody and possession of the State officer under process from a State court when seized in admiralty under process from the District Court of the United States. The Supreme Court held, that the latter process did not give jurisdiction to the District Court, and that its subsequent proceedings, including the

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sale under its decree, was invalid. But in the case before this court, it is to be observed that the steamboat Kirkman, when seized at Cincinnati under the process of this court, was not in the custody of the law or of any officer of the State of Kentucky, but under the control and in the actual possession of Givens, the claimant in these cases, as the purchaser of the boat under the order of the Kentucky court. The boat was then employed in the navigation of the western rivers for the benefit and under the control of Givens. The court in Kentucky had in fact expressed its jurisdiction, so far as the boat was concerned, by its order for the sale of the boat, and her actual sale to Givens. So far as he acquired any interest in the boat under the sale, it was his private property, but was undoubtedly subject in his hands to any lien or interest existing in favor of other parties prior to his purchase. This case does not, therefore, involve any conflict of jurisdiction between the Kentucky court and this court, or any collision between the officers of the two courts. And, therefore, the reasoning of the Supreme Court of the United States in favor of the expediency of avoiding all occasion of jealousy or hostility between the State and federal authorities does not apply. I concur fully in the soundness of the policy so forcibly and ably vindicated by the Supreme Court in the case referred to; and have studiously aimed in the performance of my judicial duties to enforce its practical observance. But I am clear that in the cases before the court its application is not called for.

A decree may be entered in favor of the libellants, McAllister & Co., the Carondelet Marine Railway and Dry Dock Company, and Spencer J. Ball, for their respective claims. The libel in the name of Bernardino Florens is dismissed at his costs.

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(CIRCUIT COURT.)

**JAMES LEE & Co. v. THE CHILLICOTHE BRANCH BANK OF THE
STATE OF OHIO:**

The law does not require any particular form of words in the transfer of negotiable paper. Any words which show an intention to transfer a note or bill, without restriction or limitation, will constitute a valid indorsement, and the indorsee, upon non-payment, may resort to the prior parties.

An indorsement on a bill of exchange of the words, "*Credit my account—James B. Scott, Cashier,*" is restrictive in its character, and suspends the further transfer and negotiability of the bill.

Such an indorsement is sufficient to apprise subsequent indorseees of the bill that no authority existed authorizing a transfer to them.

H. H. Hunter and H. Stanbery, for plaintiffs.

C. D. Coffin, S. F. Vinton, and A. G. Thurman, for defendants.

OPINION OF THE COURT:

The plaintiffs, as they allege, are the holders and indorseees of fourteen bills of exchange; and this action is brought against the Chillicothe branch of the State Bank of Ohio, as the indorser of the bills. They amount in the whole to about fifty thousand dollars, and were drawn by different persons at Chillicothe, on Edwin Ludlow, cashier of the Ohio Life Insurance and Trust Company at New York, payable to the order of James B. Scott, cashier. The declaration contains a special count on each of the bills, together with the usual money counts. It is averred that the Chillicothe Bank indorsed the bills by "the name of James B. Scott, its cashier;" and that, not being paid at maturity, they were protested for non-payment, of which the bank had due notice.

A jury has been sworn, and the plaintiffs to sustain their action have offered in evidence the several bills re-

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ferred to. They are objected to by the counsel for the defendant, as not showing any title in the plaintiffs, or any right of action in them as indorsees. This objection is urged by counsel, on several grounds, which have been brought to the notice of the court, and fully argued. In the brief views I propose to submit, I shall limit myself to the question: What is the construction and legal effect of the indorsements of the bills by Scott to Ludlow. If these indorsements restricted the further negotiability of the bills, it will be obvious that Ludlow had no authority to transfer them to the plaintiffs, and they can have no standing in courts as indorsees.

The indorsements on each of the bills is in these words: "*Credit my account—James B. Scott, Cashier.*" And the question presented is, whether they import an unqualified and unrestricted transfer to Ludlow, with the right to transfer to others, and thus continue their circulation as negotiable paper. This, it is insisted by the counsel for the plaintiffs, is the legal effect of the indorsement to Ludlow. On the other hand, it is claimed that the indorsements by the cashier of the Chillicothe Bank were intended solely to authorize Ludlow to hold the bills until their maturity, and receive the proceeds, and place them to the credit of the bank; and that by a fair and natural construction of the words used, the intention to restrict the further negotiability of the paper is legally inferable. Or, if the paper could in any sense have been subsequently transferred by Ludlow, it could only be on the condition and for the purpose stated in Scott's indorsement, and that this limitation applies to it in the hands of any subsequent holder or transferee.

It is not controverted that the Chillicothe Bank, as the holder of the bills, had a right to direct to whom the proceeds should be paid, and to designate the specific purpose to which they were to be applied. And the only question is, whether the words, *credit my account*, which precede

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the signature of Scott, imply an intention to qualify and restrict the operation of the indorsements.

It is unquestionably true, that the law does not require any particular form of words in the transfer of negotiable paper. Any words which show an intention to transfer a note or bill, without restriction or limitation, will constitute a valid indorsement, and the indorsee upon non-payment may resort to the prior parties. Indorsements, however, not intended to restrict the further negotiability of paper, are usually designated, either as in full, or in blank. An indorsement is said to be in full when the name of the assignee or transferee is stated without any words of limitation. The usual form of a full indorsement is: *Pay to A. B., or order.* An indorsement in blank is perfected by the mere signature of the indorser across the back of the paper, without prefix or affix. In the latter case the paper may be subsequently transferred by delivery; but in either case it goes into circulation unclogged by any condition or limitation. These are familiar principles of commercial law, which do not require the citation of authorities to sustain them.

It would seem to be a very clear proposition that the indorsements by Scott to Ludlow do not fall within either of the classes referred to. They are not indorsements in full, because there is no designation of the assignee or transferee. They are not blank indorsements, because there are words before the signature, which have significance, and which a subsequent holder would have no authority to strike out, and thus convert them into simple indorsements in blank.

In the progress of the arguments, very full references were made to elementary writers on the law of negotiable paper, and many reported cases have been cited bearing on the question before the court. It is hardly necessary to notice these authorities in detail. It may be stated, however, that the general doctrine sustained by the authorities and cases cited, is that effect will be given to any words

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used by an indorser, showing the specific purpose of the indorsement, and directing payment to be made to a particular person or for a special purpose ; and that subsequent holders of the paper take it subject to the limitation imposed. That the words, *credit my account*, which precede the name of Scott in the indorsements under consideration, are within this principle, seems quite clear. It is true that among the many cases cited by counsel, there are none in which this precise form of words is used. But the principle is fully recognized, and these authorities are entitled to respect as giving it the highest judicial sanction. Without stopping to analyze the many cases referred to, in which indorsements have been held to be restrictive in their character, as suspending the further negotiability of commercial paper, the following instances may be briefly stated: *Pay to my use. Pay to A. only. Pay the contents to the use of B. only. Pay the money to my servant for my use. Carry this bill to the credit of A. The within must be credited to L. H. value in account. Pay to J. P., or order, for account of T. & W.* Chitty on Bills, 176, 177; Byles on Bills, 121 (marginal paging); Edwards on Bills and Prom. Notes, 277, 278; Story on Bills, sec. 211; 2 Bur. 1227; Douglass, 687; 8 Taun. 100; 159 Com. L. 819; 8 Mass. 227; 5 Mass. 544.

As before intimated, the words, *credit my account*, can not be supposed to have been used without a meaning and a purpose. They were clearly intended as a naked authority to Ludlow to receive the proceeds of the bills, and credit them to the account of the Chillicothe Bank. This is their fair import; and that they were so intended by Scott can not be doubted. He is the cashier of an important banking institution, and may be presumed to be familiar with all the different ways of transferring negotiable paper. He is, without doubt, cognizant, not only of the form, but the legal effect of the various species of indorsements in use among bankers and commercial men. That he did not intend the transfer of the paper to Ludlow to have the effect

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of the usual indorsement, either in full or in blank, may be inferred from the fact that the words used negative such a purpose. Why adopt the words, *credit my account*, if the usual indorsement had been intended? The words are equivalent to a direction to Ludlow to credit the proceeds to the Chillicothe Bank on account, instead of making an actual remittance of the funds. They are in effect, as if he had written: *Pay the proceeds to the bank, by a credit of the amount to its account*. If such had been the form of the indorsements, could there have been a possible doubt as to their meaning?

Although in the present posture of this case, the court can not notice the known course of business between Ohio banks and those in New York, or the business relations existing between the institution represented in that city by Ludlow, and the Chillicothe Branch Bank, yet it is not perhaps a strained inference from the words used by Scott, that there were existing accounts between them, and a balance due from the latter to the former, which was to be reduced or paid by the application of the proceeds of the bills in question. The transaction is susceptible of this view from the language in which the indorsements are couched. And thus viewed, it needs no argument to prove that it was decidedly in bad faith for Ludlow to use the paper for a purpose not in the contemplation of the indorser, and greatly to the hazard of the Chillicothe Bank. This, it is true, under ordinary circumstances, could not affect the rights of these plaintiffs without knowledge of the dishonest purpose of Ludlow in making the transfer. But the words of the indorsements to Ludlow, were sufficient to apprise the plaintiffs of the real character of the transaction, and operate as a notice to them that Ludlow had no authority to indorse the paper to them, so as to divert the proceeds from the object intended. I confess to some incredulity as to the good faith of the plaintiffs in this transaction. I am slow to believe that a banker or business man, of reasonable intelligence, with the qualified indorse-

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ment of Scott before him, would have taken this paper, with the hope or expectation that the Chillicothe Bank would be liable as an indorser, in case of non-payment by the drawers.

It would not be proper to indulge in any speculative remarks in regard to this transaction, as between Ludlow and the plaintiffs. There may be facts involved which will never be brought to the light of day, and which, if fully developed, would reveal great frauds. This consideration, however, can not influence or control the decision of the court, on the question before it. There seems to be enough, in the very vestibule of this case, to warrant the legal conclusion that these plaintiffs received the bills in question with full notice that Ludlow had no right to transfer them in any other sense, or for any other purpose than that indicated by the terms of the indorsements, and that they have no standing in court as indorsees, and no right of action on these bills. In the judgment of the court, therefore, these bills can not go in evidence to the jury.

As this view is decisive of the case, it is unnecessary to discuss the other objection presented by counsel, namely: that the official character of Scott, as the cashier of the Chillicothe Branch Bank, does not appear in the bills, or by his indorsement, so as to create a legal liability in the bank as indorser. The point has been strenuously urged by counsel, but for the reason indicated, I give no opinion upon it.

The plaintiffs were nonsuited.

Dodge v. Card.

(CIRCUIT COURT.)

CALVIN DODGE AND JOHN B. RYAN v. THOMAS F. CARD. IN EQUITY.

It is in accordance with the practice and decisions of the court to refuse a preliminary injunction if, upon the facts presented, there is a fair doubt whether the defendant has infringed.

The law is well settled that a patent for a combination of old things, applied to produce a new and useful result, is not violated unless all the parts or elements of the combination are used.

When the plaintiffs' patent was for the combination of a flat, horizontal iron plate in connection with a chamber or recess below the plate, and the defendant put horizontal plates into fire-places already provided with recesses which he had no agency in constructing: *Held*, that the question of infringement was so far doubted as to forbid the granting of an injunction.

THIS was a motion for a preliminary injunction to restrain defendant from infringing letters patent granted to Calvin Dodge for an "improvement in fire-places," granted March 18, 1858, one-half of which was assigned to John B. Ryan. The disclaimer and claim of the patent were as follows:

"I do not claim the contracting of the vent or throat of the chimney, as that is well known as a device; but I do claim the use of a deep recess, A B C D, or chamber, placed back of the fire-basket, L, of the grate, and out of the reach of the draft, in combination with the horizontal covering F, over the recess and fire-basket, extending down below the mouth of the chimney, constructed and arranged substantially as hereinbefore described, for the purpose of consuming the smoke and causing the ignition of the gas, which would otherwise be lost, and thus increasing the amount of heat thrown into the room, and by the slow combustion of the fire effecting a great saving of fuel."

The defendant had letters patent for an "improvement in fire-places," dated April 17, 1860, which described an arched

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deflecting plate to be placed over the fire-basket. He put up one of these plates in a fire-place where a recess back of the fire-basket had already been formed by the mason who built it. The complainants insisted that the defendant thus completed the combination patented to Dodge, by placing a horizontal cover over a deep recess, and that he was responsible for *making* the patented improvement.

G. M. Lee and S. S. Fisher, for complainants.

Curwen & Wright, for defendants.

OPINION OF THE COURT:

The complainants have filed their bill, praying, among other things, for a provisional injunction to restrain the defendant from using or vending his improvement in chimney flues, as being an infringement of the rights of complainants, under a patent issued to the said Calvin Dodge, on March 18, 1856. They allege they are now the joint owners of the patent, and that the defendant is using and vending an improvement, substantially the same as that embraced in their patent.

The defendant has not put in his answer to the bill, but appears and resists the motion for an injunction on the grounds:

First. That the improvement patented to Dodge is not new.

Second. That he has not infringed his right under the patent.

It would not be proper, nor is it intended, in this preliminary motion, to decide definitely the merits of the controversy between these parties. The only question now to be considered is, whether the facts before the court are such as to warrant an order for an injunction. These facts are presented in the affidavits exhibited in connection with the patents granted to Dodge, and the defendant, Card, for their improvements. And in the brief statement of my views

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on this motion, I shall limit myself wholly to the question of infringement.

It is proper here to remark that it is in accordance with the practice and decisions of this court to refuse an injunction if, upon the facts presented, there is a fair doubt whether the defendant has infringed. In my judgment, there are sufficient grounds for such a doubt in the present case, and I am clear, therefore, that it would not be proper for the court to interpose by the award of such process.

The Dodge patent, which has been referred to, embraces an invention which, though simple in its character, is undoubtedly useful. The claim of the patentee is for a combination, consisting of a flat iron plate placed horizontally above the grate, closing the throat or flue of the chimney, with the exception of a narrow opening in front for the escape of smoke, in connection with a chamber or recess below the plate, from six to eighteen inches in depth from the front of the grate. The utility of the invention, as claimed by the patentee, consists in this—that the smoke and gas from the burning coal strike against the iron plate, and are detained in the chamber or recess below until they are partially consumed, and the heat radiates from the chamber or recess, while the unconsumed smoke escapes through the narrow opening in front; thus increasing the heat from the grate with less than the usual quantity of fuel.

In April last, the defendant obtained a patent for an iron plate, to be placed in the flue of the chimney, in an arched position, so constructed as to be capable of extension, and of being adjusted to suit the dimension of any flue, without alteration. This is the only claim of his patent; and its utility consists in its adaptation to any fire-place or flue, and its effect in preventing the heat, to some extent, from escaping up the chimney. It provides for no particular mode of setting a grate, nor for any chamber or recess in the rear, which is one of the elements of the combination embraced in the Dodge patent.

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The only evidence before the court to sustain the allegation of the bill that the defendant has infringed the Dodge patent, is found in the affidavit of P. W. Strader. He states that he employed Card to put his patented plate in six fire-places at his dwelling-house in Cincinnati, but that Card had nothing to do with setting the grates in the adjustment of his extensible plates. It appears, however, from the affidavit of Knight, who examined these fire-places, that, as the result of putting in the defendant's plate, a recess or chamber was left in the rear of the grate, corresponding substantially with that contemplated by Dodge's improvement.

It is not necessary, on this motion, to decide whether the extensible iron plate claimed by Card as his invention, and patented to him, is identical with that claimed by Dodge as a part of his combination. If it be conceded that they are substantially the same, does it necessarily follow that Card, in using one part of the Dodge combination, has infringed his patent? The law is well settled, that a patent for a combination of old things, applied to produce a new and useful result, is not violated unless all the parts or elements of the combination are used. And I can not perceive on what ground it can be claimed, that Card, in the use of his plates in the fire-places at Strader's, under the circumstances before stated, has infringed the two elements of the Dodge combination. It is true, it resulted incidentally from the use of his plates at Strader's that recesses or chambers were left in the fire-places, similar to those claimed by Dodge as a part of his invention. But Card is not responsible for this result, as he had no part or agency in the construction of those recesses or chambers, nor does it appear that they are necessary to the successful operation of his plates, according to the claim of his patent.

But without giving a final and positive opinion on this point, I am clear in the conviction that the complainants have not made out a case justifying an order restraining the defendant from the use or sale of his plate, under the cir-

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cumstances in proof before the court. On the final hearing, when the evidence shall be fully before the court, this question can be reviewed. At present, it is clear the complainants are not entitled to an injunction, and the application is therefore overruled.

Whether the complainants have a remedy as for an infringement of their patent, against those using Card's plate in connection with such a recess or chamber, as that claimed by Dodge as a part of his combination, is not now before the court, and of course not for its decision.

Injunction refused.

(DISTRICT COURT.)

OLIVER P. THORP ET AL. v. STEAMBOAT DEFENDER.

The second rule of navigation adopted by the board of supervising inspectors, under the steamboat law of 1852, giving an ascending boat the right to choose the side she prefers to take, when meeting a down boat, must have a reasonable construction, and can not be understood as giving the up-stream boat a right under all circumstances of choosing her line of navigation.

If an ascending boat is coming up on one shore, and a down boat is seen above on the opposite side, the river being wide, with an ample depth of water in the intervening distance between the boats, and the up-stream boat is not required for business purposes to make a crossing, she ought by one sound of the whistle to signify her purpose of keeping up the same side. She has no right unnecessarily or capriciously to require the descending boat to change her course.

It is a sound rule of navigation applicable to the western rivers, recognized by courts exercising admiralty jurisdiction, that an ascending boat should not cross a channel when a descending boat is so near that it would be possible for a collision to occur.

A descending boat has a right to the channel of the river, and, while in her proper place, it is the duty of the ascending boat so to regulate her movements as to keep out of the way.

It is a great error, and one which must always incur hazard of a collision, for an ascending boat to attempt to cross the bow or in front of the descending boat unless the distance between them is such as to exclude the possibility of their coming in contact.

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An up-stream boat, wishing to cross a channel when a boat is coming down, must either slacken her speed or stop altogether until the down boat has passed, and this rule is not affected by the fact that the signals between the boats give the ascending boat the choice of sides; for it is a paramount rule of navigation that, if possible, collisions must be avoided, and an error by one boat will not justify another in running into her unless it was unavoidable.

If a mutual fault occasions a collision, the damages for the injury must be divided between the boats; but if the fault was wholly on one side, the culpable boat must bear the entire loss.

Mills and Hoadly, for libellants.

Lincoln, Smith & Warnock, for respondents.

OPINION OF THE COURT:

This suit is prosecuted by the libellants, as owners of the steamboat *William Baird*, to recover damages for injuries resulting from a collision with the steamboat *Defender*, which occurred on the Mississippi river some sixty miles above Vicksburg, about twelve o'clock, in the night of November 4, 1856.

The case made in the libel is, in brief, that the *Baird*, properly manned and equipped as a freight and passenger boat, was proceeding on a trip from New Orleans to St. Louis, and when near what is called the Tennessee landing, steering up the Mississippi shore, the pilot was about to make the usual crossing to the Louisiana shore, when he discovered the *Defender* about one mile above, coming down near the Louisiana side, and about to cross from that side to the opposite shore; that on seeing the descending boat, the pilot of the *Baird* sounded two blasts of the whistle as a signal that he wished to take the larboard side in passing the *Defender*, and that the pilot of the latter boat thereupon sounded his whistle twice, to indicate his acceptance of the *Baird's* signal; that the *Baird*, in accordance with the signals, was immediately pointed across toward the Louisiana shore, and in her efforts to get to the larboard, was running nearly square across the river; that the *Defender* pursued the proper course of a down boat, under the signals which had passed, until she came within a short

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distance of the Baird, and then straightened down stream, and came "head on" against the starboard quarter of the Baird, striking her about the middle of the boilers, displacing the boilers, breaking the connection steam-pipes, carrying away the starboard guard, and crushing in some of the planks of the hull, thereby causing the water to flow in rapidly, and endangering both the boat and cargo, and making it necessary to throw overboard a large quantity of salt and lumber, which were a part of her cargo.

The libel contains the usual averment that the collision resulted solely from the mismanagement and fault of those in charge of the Defender, and the libellants claim full damages for the loss of, and injuries to, the cargo, for the costs of repairing the injuries sustained, and for the detention of the boat while the repairs were in progress.

The answer of the respondents sets forth that the pilots of the Defender, the boat being near the Louisiana shore, at a point called Pecan Grove, saw the Baird coming up on the Mississippi side, and when nearly opposite Benhampton two whistles were heard from the Baird, indicating the wish of the pilot to pass up on the larboard side; that the signal, though unusual and not according to the proper course of navigation, was accepted by the pilot of the Defender, and responded to by two whistles; that he immediately pointed his boat toward the Mississippi shore, intending to make a long crossing, and heading to a point a short distance above Benhampton, thus leaving ample room for the Baird to pass up on the Louisiana side, for which she had signaled; that in violation of her signal the Baird continued some distance up the Mississippi side, and when within one hundred yards of the Defender, suddenly changed her course to the larboard and ran nearly square across toward the Louisiana shore, and directly across the bow of the descending boat; that the Defender, being near the middle of the river, quartering toward the Mississippi shore, with her starboard bow

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struck the starboard quarter of the Baird, near the middle of the boilers, thereby giving a glancing blow, quartering aft in its course.

The respondents also aver that the Defender, after accepting the signal of the Baird, pursued the proper line of navigation, without any material change of direction; and that the sole cause of the collision was the sudden change of the Baird to the larboard, and her attempt to cross the bow of the Defender, when the boats were so near. The answer further avers, that the collision occurred just below the Tennessee landing, about one-third of the way from the Mississippi shore, and that it resulted solely from the fault of the Baird.

The answer also alleges that the Defender suffered damage to a small amount, for which the respondents claim compensation. And they also assert a claim for salvage service rendered the Baird, in saving the boat and cargo from entire loss.

The merits of this controversy obviously lie within a narrow compass. The parties agree in their statements of some of the facts involved in this collision. But as to the course and position of the boats previous to and at the time of the accident, their theories are in direct conflict, and both can not be sustained. The libellants contend that the Defender did not run in accordance with the signal given and accepted. They insist that, instead of crossing to the Mississippi shore, she kept near the middle of the river, and when within a hundred yards of the Baird, wrongfully changed her direction, and steered, *head on*, toward the Baird, and ran into her as she was crossing to the Louisiana side. On the other hand, the respondents insist that, in obedience to the signal, their boat, at the time of the collision, was passing down nearer the Mississippi than the Louisiana shore, slightly quartering toward the Mississippi side, in the usual and proper place for a descending boat, and that the Baird, in plain violation of an established rule of navigation, when the boats were from one hundred

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to two hundred yards apart, attempted to make a straight crossing directly across the bow of the Defender, and that by reason of this movement the Defender unavoidably, and without any fault on her part, came in contact with her.

As to some of the facts involved in this controversy there is no conflict, either in the statement of the parties or the evidence adduced. There is no dispute as to the signals which passed between the boats, nor is there any disagreement in the evidence, that the Baird was coming up, near the Mississippi side, when the Defender was first seen, about a mile above, near what the witnesses call a false point on the Louisiana shore. Nor is there any question that the river was wide the whole distance between the boats when the signals passed. It is equally certain there was sufficient depth of water for either boat, from shore to shore. It was about twelve o'clock at night, but not so dark as to prevent a boat from being distinctly seen a mile distant, or to render navigation difficult or dangerous.

In reference to these general facts, it is very obvious that the collision could not have occurred without fault of one or both boats. And the question presented is, which boat is to be held responsible for the injury and loss resulting from the collision. The respondents insist that the first error or fault was committed by the Baird in signaling for the larboard or Louisiana shore. And the preponderance of the proof as to the proper and usual way of navigating the river at that point sustains this view. There is no evidence that the Baird had any business call to the opposite shore, and no reason is perceived why she could not have kept up the Mississippi side, at least until the descending boat had passed. There was sufficient water along that shore, nor does it appear that there was any difficulty in pursuing that course. It would seem, therefore, that the pilot of the Baird erred in signaling for the larboard side. But it is insisted by the libellants that, by rule 2 of the rules of navigation adopted by the board of supervising inspectors under the steamboat law of 1852, it is the right

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of the ascending boat to choose the side she prefers to take when meeting a down boat. That rule provides that the pilot of the ascending boat shall, by one sound of the whistle, indicate his wish to keep to the starboard of the descending boat, and if he whistles for the larboard or left side, he is required to give two sounds of the whistle. And the descending boat is required to respond promptly by corresponding signals to signify the assent of the pilot to the signal from the other boat; and both boats are then to be steered in accordance with the signals. This rule must have a reasonable construction. It can not be understood as giving the up-stream boat a right, under all circumstances, of choosing her line of navigation. If the ascending boat is coming up on one shore, and a down boat is seen above on the opposite side, if the river is wide, with an ample depth of water in the intervening distance between the boats, and the up-stream boat is not required for business purposes to make a crossing, she ought, by one sound of the whistle, to signify her purpose of keeping up the same side. She has no right, unnecessarily or capriciously, to require the descending boat to change her course. The object of this rule, and all other rules of navigation, is to avoid collisions. But it is obvious that the danger of collisions would be greatly increased if either boat, in the circumstances supposed, could by signals require the other boat to cross the river, and thus materially change her direction. There could be no possible danger of coming together if each kept on the course she was steering until they had passed each other. It would seem clear, therefore, that the Baird was wrong in claiming the larboard or Louisiana shore in ascending the river. But it is contended by the libellants, that if the signal of the Baird was erroneous, yet, as it was recognized and accepted by the pilot of the Defender, it can not be imputed to the former boat as a fault. I can, however, see no ground for holding that the acceptance of an erroneous signal, if injury results from such signal without any fault on the part of the boat which receives it,

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can exonerate the boat which gives it. In this case it was not a fault in the Defender that she signified her willingness that the Baird should have the choice of sides. It was not an admission that she had, under the circumstances of the case, a right to choose the larboard side; and the acceptance of the wrong signal only laid the obligation upon the Defender to obey it in good faith, and that the boat should be skillfully steered in accordance with it. If thus acting, and without fault in her navigation, the Defender came in contact with the Baird, and inflicted an injury on her which can be traced to the erroneous signal given by that boat, there is no ground on which she can be held responsible for it.

But there is no necessity to discuss, or to decide upon the effect of the erroneous signal by the Baird. There is another aspect of the case, that seems decisive of the question of fault, as between these boats. It is clear from the evidence that the Baird was not steered in accordance with the signal given and accepted, and that her course was in direct violation of a well-settled and imperative rule of navigation. It was clearly the duty of her pilot, under the signal he had given, if the distance between the boats was such as to have rendered a crossing practicable without danger of collision, to have passed at once to the larboard side. Instead of this, the weight of evidence clearly shows that, for some time after the signals passed, she kept up the Mississippi shore, quartering toward the Louisiana side, until the Defender was not exceeding two hundred yards above her, when she suddenly changed her course more to the larboard, and was, according to the evidence, on both sides, nearly square across the river, just preceding and at the time the boats came together. This fact is averred in the libel, and is amply sustained by the evidence. It is equally certain, that the Defender, from the time she accepted the signal of the Baird, was steered, without any material deviation, on a line obliquely tending toward the Mississippi shore, and had progressed, at least, to the middle

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of the river, and, as many of the witnesses testify, was at the time of the collision nearer the Mississippi than the Louisiana shore. In this position of the two boats, a more palpable error can not well be conceived of, than that committed by the Baird, in attempting to pass in front of, or across the bow of the Defender. It would seem that when this attempt was made, the boats were not more than one hundred or one hundred and fifty yards apart, and a collision would be the inevitable result of attempting to cross before the descending boat. At the time this occurrence took place, there was an express rule adopted by the board of supervising inspectors, which prohibited such a course. That rule declared, that "it shall not be lawful for an ascending boat to cross a channel when a descending boat is so near that it would be possible for a collision to ensue therefrom." If such a rule had not received the sanction of the board of supervising inspectors, there can be no question that it must be recognized, by courts exercising admiralty jurisdiction, as a sound rule of navigation, applicable to the western rivers. It is well settled that a descending boat has a right to the channel of the river, and that while in her proper place, it is the duty of the ascending boat so to regulate her movements as to keep out of the way. And it is very obvious that it is a great error, and one which must always incur the hazard of a collision, for the ascending boat to attempt to cross the bow, or in front of the descending boat, unless the distance between them is such as to exclude the possibility of their coming in contact. This rule of navigation has its foundation in good sense. Experience proves that in the navigation of the western waters, great errors are often made in estimating distances, more especially at night or in bad weather. As a rule of prudence, therefore, the up-stream boat, wishing to cross a channel when a boat is coming down, must either slacken her speed, or stop altogether until the down boat has passed. And this rule is not affected by the fact that the signals between the boats give the ascending boat the

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choice of sides. It is a paramount rule of navigation that, if possible, collisions must be avoided, and an error by one boat will not justify another in running into her, unless it was unavoidable.

That the Defender was in the right place for a descending boat, at the time of the collision, near the middle of the river, her head pointed toward the Mississippi shore, and that the Baird was running nearly at a right angle with the Louisiana shore, is not only proved by the witnesses who testify as to the course and position of the two boats, but is conclusively established by a controlling fact in the case, which does not admit of doubt or controversy. The fact referred to is, that the blow received by the Baird was upon her starboard quarter, opposite the boilers, and raked aft for the distance of about twenty feet. Now, the theory of the libellants is—and such are the averments in the libel—that the Defender, after the signals, was steered correctly, until near the Baird, when she changed to the starboard, and came “head on” against the starboard side of the latter boat. Upon this theory, the Defender would have struck the Baird either at a right angle, or quartering in the direction of her bow. But, as before stated, the Defender came obliquely against the Baird, inflicting a glancing blow, raking toward the stern. The evidence most satisfactorily proves that this was the character of the blow. The carpenters on both boats so describe it in their depositions, and in the diagrams which they annex. And this fixes the position of the boats, at the time of the collision, with all the certainty of mathematical proof.

Upon the whole, the following conclusions are satisfactorily attained in regard to this collision: 1. That the Baird did not, in accordance with her signal, attempt an immediate crossing to the Louisiana shore, but kept up some distance near the Mississippi side, and was then turned nearly square across the river, and was in that position when the boats came together; 2. That the pilot of the Baird was greatly in fault in thus attempting to cross the bow of the descend-

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ing boat ; 3. That this error was the direct cause of the collision.

It remains only to inquire whether there was any fault on the part of the Defender, justifying a decree for a division of damage resulting from the collision. It is well settled, that if there was mutual fault, the damages for the injury must be divided between the boats ; but if the fault was wholly on one side, the culpable boat must bear the entire loss.

In my judgment there is no ground for such a division in the present case. The weight of the evidence shows clearly there was no fault in the management of the Defender. As to her course, the following propositions are sustained with reasonable certainty: 1. That the Defender, when the signal of the Baird for the larboard side was given and accepted, was descending nearest the Louisiana side, and that in accordance with the signal her course was immediately changed toward the Mississippi shore; 2. That being thus steered, without any material variation in her course, she had reached the middle of the river, and was probably nearer the Mississippi than the Louisiana side when the collision happened, thus leaving ample room for the Baird to pass to larboard, according to her signal; 3. That when the Baird turned suddenly to the larboard, attempting to cross in front of the Defender, the latter boat seeing the danger of a collision, did all she could to avoid it, in stopping and backing as soon as possible.

In their answers, the respondents have set up a claim for compensation for a salvage service in the aid rendered in saving the Baird and her cargo. There can be no doubt that the conduct of those in charge of the Defender after the collision was highly praiseworthy. They rendered prompt and efficient service to the injured boat, but they did no more than they were required to do by the obvious dictates of duty. And neither the boat nor cargo, or the persons on board the Defender, were in peril as the result of their interposition. Nor is it certain that the Baird or her cargo would have

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been lost, if no aid had been afforded by the Defender. But, without going further into the consideration of the salvage claim, I am quite clear in the conclusion that it ought not to be allowed.

The respondents also claim a decree for the injury sustained by the Defender from the collision. It appears from the evidence that she was slightly injured, and that the expense of repairing her was from fifty to one hundred dollars. Probably, under all the circumstances of the case, the lowest sum named would be an adequate compensation for the injury, and a decree for fifty dollars may be entered in favor of the respondents.

(CIRCUIT COURT.)

EUNICE B. HUSSEY, ADM'X OF OBED HUSSEY, DEC'D, v. WM. N. WHITELY, JEROME FASSLER, AND OLIVER S. KELLY.
IN EQUITY.

H. assigned to M. A. & Co. all his right and interest under his patent in twenty-three counties in Ohio, including that in which the defendants' manufactory was carried on. M., A. & Co. were to pay ten dollars for each machine made and sold by them, while H. reserved the right of sending machines of his own manufacture into the territory named in the contract. *Held*, that this paper was not an assignment of the interest of H. in the patent within that territory named, but a mere license.

H., by virtue of the rights reserved to him, must be viewed as a "*party aggrieved*" in the words of section 17 of the act of July 4, 1836, and he had an undoubted right to proceed in equity, for the protection of his rights, without joining M., A. & Co. as parties complainant.

By law, a district judge is associated with a justice of the Supreme Court of the United States in holding a Circuit Court, and may hold that court alone, in the absence of the superior judge; but it would be clearly wrong in a district judge, as a judge of the Circuit Court, in any case, to review or set aside the action of the superior judge.

But, if the aspect of the case, as presented to the district judge, is substantially changed by new evidence, which, it may be fairly presumed, if brought to the notice of the presiding judge, would have led to differ-

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ent action, it would be the duty of the former to consider such proof and act in accordance with it.

Presumptions of the novelty of a patented invention may arise from some or all of the following grounds: 1. The oath of the patentee that he was the first and original inventor. 2. The action of the Patent Office in granting the patent after full examination. 3. Undisturbed enjoyment of all the benefits of the exclusive rights granted by the patent. 4. Direct adjudications, either at law or in equity, establishing the validity of the patent. 5. Injunctions granted to restrain infringement of the patent.

The authorities are numerous to support the position, that when such grounds of presumption exist in favor of the novelty of a patented invention, courts will not refuse an injunction, or, if granted, will not dissolve it unless the patent is impeached by the most conclusive evidence.

If the defendant, upon a motion to dissolve an injunction, so clearly and conclusively impeaches the novelty of the invention of complainant as to leave no doubt on that point, it might be the duty of the court, against all the presumptions in the patentee's favor, to release the defendant from the operation of the injunction.

The fact that a defendant is suffering serious injury from the stoppage of his manufactory, by an injunction, furnishes no reason for a departure from the well-settled rules of chancery practice in patent cases; especially if there be no pretense that he has proceeded in ignorance of the patentee's invention.

THIS was a motion to dissolve a provisional injunction, granted by Mr. Justice McLean, while sitting at chambers in Cleveland, to restrain defendants from infringing letters patent for an "improvement in reaping machines," issued to Obed Hussey, August 7, 1847, and reissued April 14, 1857, in three divisions. The claims of the original and reissued patents, with a sketch of the invention, will be found in the report of *Hussey v. Bradley*, 2 Fisher, 362.

The motion to dissolve was predicated mainly upon a license from the complainant to Minturn, Allen & Co. to use the invention within twenty-three counties of Ohio, including that in which the manufactory of the defendants was located. It was insisted that this paper constituted an exclusive grant, and that suit must be brought in the name of the grantees, or that in any event, they must be joined as parties complainant.

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N. C. McLean, P. H. Watson, and E. M. Stanton, for complainant.

G. M. Lee and S. S. Fisher, for defendants.

OPINION OF THE COURT :

A motion has been made and fully argued by counsel on both sides, for the dissolution of the injunction granted by Judge McLean, in July last. The grounds stated in the written motion on file, are in substance, that the order for the injunction was improvidently made, contrary to the evidence in the case, and that the improvements patented to Hussey were known and in public use prior to the date of his invention.

Before referring to the grounds upon which the present motion is urged, it will be necessary to notice another, set forth in the answer, and insisted on in the argument by the counsel for the defendants, but not included in the written reasons on file. In their answer they aver that Hussey, on February 5, 1852, by a written instrument, assigned to Minturn, Allen & Co. all his right and interest, under his original patent of 1847, in twenty-three counties in the State of Ohio, including the county of Clark, and that if said patent and the reissued patents are valid, and have been infringed by the defendants, a suit for such infringement can only be maintained by Minturn, Allen & Co., and that Hussey, therefore, in his lifetime had, and his representatives since his death have, no right of action for such infringement.

If the legal effect of the contract referred to is as claimed by the defendants' counsel, it is clear that the motion to dissolve the injunction must prevail. It is, therefore, necessary to look into the contract, to determine the question. The written instrument referred to in the answer is made an exhibit by the defendants, but was not before Judge McLean when the application for injunction was made, and the question now presented was not brought to his notice.

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By this agreement or contract, Hussey granted to Minturn, Allen & Co. the exclusive right to make and sell his improved reaping and mowing machine, during the continuance of his patent, within the county of Clark, and a number of other counties in the State of Ohio, and they were to pay ten dollars for each machine made and sold by them. Hussey expressly reserved the right of sending machines of his own manufacture into the territory embraced in the contract.

The inquiry arises, whether this contract imports such a transfer of Hussey's interest in this patent as to preclude him from a remedy in chancery for infringement in making and vending the patented machine within any counties included in the grant to Minturn, Allen & Co. And it would seem that section 17 of the act of July 4, 1836, viewed in connection with the contract, furnishes a satisfactory solution of the inquiry.

That section, after declaring that the Circuit Courts of the United States (or District Courts having Circuit Court powers) shall have jurisdiction of all suits and controversies arising under the patent laws of the United States, proceeds as follows: "Which court shall have power, upon a bill in equity filed *by any party aggrieved*, in any such case, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor, as secured to him by any laws of the United States, on such terms and conditions as said courts may deem reasonable."

The sole question is whether Hussey can be viewed as a "*party aggrieved*" within the meaning of the provision just quoted. And of this there does not seem to be any reason for doubt, if it be conceded that there has been an infringement as alleged in the complainant's bill.

The contract between Hussey and Minturn, Allen & Co. is not and does not purport to be an assignment of Hussey's interest in the patent within the territory named. It is a mere grant of the right to make and sell the patented

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machine within those limits in consideration of the payment to Hussey of ten dollars for each machine made and sold, reserving to Hussey an unlimited right to send into that territory and vend machines manufactured by himself.

Under this contract, Minturn, Allen & Co. are mere licensees of Hussey, incurring no obligation except the payment of the stipulated price of each machine they may construct and vend. Hussey's interest in his patent remained in full force, within the counties included in the grant to Minturn, Allen & Co., subject to their right to make and sell under the contract; and his profit was wholly dependent on the number of machines made and sold by his licensees. And that profit would be reduced in proportion to the number of machines made and sold by others in violation of his right under his patent. Moreover, the right reserved by Hussey to send machines for sale within the territory named, would be of no value to him unless he was protected from unlawful infringement, as every machine made and sold within the district by an infringer would have a direct effect in depriving him of the profit he would otherwise derive from sales made within it.

He must be viewed as a "*party aggrieved*," in the words of the statute, and has heretofore an undoubted right to proceed in equity for the protection of his rights.

The next inquiry is whether the court, constituted as it now is, can rightfully order the dissolution of the injunction, on the facts now presented. There is some controversy between the counsel as to what occurred on the application for the injunction before Judge McLean and the ground of its allowance by him.

The order made by him, and which is now before the court, must be viewed as conclusive of the facts which it recites. That order recites that the complainant, Hussey, "had shown a valid right in equity to be protected in the exclusive enjoyment and use of the improvements patented

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to him in his reissued patents, No. 449 and No. 917, and that the said patents are unlawfully infringed by their use without the complainant's license or authority in the reaping machines made by Whitely, Fassler & Kelley, and that the defendants have failed to show any good cause for impeaching or disputing the validity of said reissued patents."

It is clear, from the language of this order, that Judge McLean had distinctly under review, and passed upon: 1. The novelty of Hussey's invention as covered by his patents; 2. The infringements of those patents by the defendants, and upon these grounds, after full argument, it was adjudged by him that it was a proper case for an injunction; and the order was accordingly made. Now, it is insisted that the order was made by mistake, and against the evidence, and that the injunction should therefore be dissolved. On the part of the complainant, it is contended that the questions presented on the present motion are precisely those which were before Judge McLean when the injunction was ordered; and that its dissolution now, by the action of the district judge sitting alone in the Circuit Court, would be equivalent to a review and reversal of the judgment of the presiding judge. And most certainly, if the issue and facts involved in the present motion are substantially those submitted to and passed upon by Judge McLean in granting the injunction, it would be improper in this court, as now organized, to order its dissolution. This court will not ignore the true legal theory of the organization of the courts of the United States. By law, a district judge is associated with a justice of the Supreme Court, in holding a Circuit Court, and may hold that court alone, in the absence of the superior judge; but he would fail, in a just appreciation of the proprieties of his position, if he did not, under all circumstances, show a proper deference to the action of that superior. And clearly, it would be wrong in a district judge, as a judge of the Circuit Court, in any case, to review or set aside such

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action. At least the reasons that would justify such a course must be peculiar and stringent. In my judgment, the reasons now urged are not sufficient to require this court to set aside the order of Judge McLean granting the injunction in this case.

I am not informed whether the learned judge, who ordered this injunction, gave an opinion in writing in deciding the questions before him. If the opinion was so given, it has not been presented to me; and I can not, therefore, know the course of reasoning by which the judge reached the conclusion he announced; but it appears, by reference to the order made by him, that he held the patents to Hussey—449 and 917—to be valid, and that the defendants had infringed them; and, therefore, that they ought to be restrained from the further manufacture of the infringing machines, until the case could be fully and finally heard on its merits.

It is readily conceded, that if, in support of this motion, the defendants have substantially changed the aspect of the case by adducing evidence not presented to Judge McLean, and which, it may be fairly presumed, if brought to his notice, would have led him to refuse the injunction, it would be the duty of this court to release them from its further operation. But if the questions involved are essentially the same in the two motions, and the ground of the motion to dissolve is based on the mere fact that the defendants have adduced additional evidence, altogether cumulative in its character, the motion will be refused.

In considering briefly whether the phase of this case is materially changed by the additional proofs offered by the defendants, it will not be necessary to analyze the patents to Hussey now in controversy, nor to notice critically the proofs touching the novelty of the inventions embraced in them. It is not my desire or purpose to prejudice any question which may arise on the final hearing of this case, and which must then be decided. I shall endeavor to limit my inquiries to such considerations as are necessarily connected

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with the motion to dissolve this injunction. And it may be remarked, in the first place, that the complainant, in his application for the injunction, claimed only that the patents No. 449 and No. 917 had been infringed by the defendants, and these alone are referred to in the order made by Judge McLean.

The patent No. 449 is dated April 14, 1857, and is a reissue of a patent to Hussey dated August 7, 1847. The principal element of the invention covered by the original patent of 1847 was an improvement in the cutting apparatus of the reaper and mower, by the use of a slotted finger, the upper and lower parts of which were connected with each other only at the points, leaving an opening in the rear for the escape of material that would otherwise clog and impede the action of the cutter. The reissued patent 449 embraced this improvement in the finger, used in combination with a vibrating scalloped cutter; the structure and operation of which are fully and minutely described in the specification. The patent 917 is also a reissue, embracing substantially the open slotted finger of the preceding patents, with the scalloped cutter, but dispensing with the platform called for in the specification of those patents, and thereby adapting the machine to use as a mower.

The novelty of the inventions covered by these two patents was the only question before Judge McLean on the application for injunction. All the evidence in the case had a primary reference to this point, as it was not controverted that the machines made and sold by the defendants embodied substantially the improvements patented to Hussey. And the machines, the prior knowledge and use of which, it was insisted by the defendants, impeached the novelty of Hussey's invention, were the same now relied on for the same purpose. These were the Moore & Hascall harvester, and the reaper constructed by John M. Leland. The argument then, as now, was that these were identical in the cutting apparatus with the principle of Hussey's

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patent of 1847, and were known prior to his invention. Thus it will be seen that the questions made before and decided by Judge McLean were the same that are now before this court, on this motion to dissolve this injunction. The fact that the defendants have, since the hearing on the application for the injunction, filed their answer denying the novelty of Hussey's invention, and offering additional evidence on that point, does not negative the fact that the issues then and now are the same. Nor are the presumptions, which justified the order for the injunction, in any degree weakened by the present posture of the case. As to the additional evidence, it is not offered as proving any fact not in issue and controverted, on the original hearing, and is, therefore, altogether cumulative in its character, and affords no sufficient grounds for setting aside the order then made.

In the case of *Wadsworth et al. v. Rogers et al.*, 3 W. & M. 135, 2 Robb's Pat. Cas. 625, Judge Woodbury, delivering the opinion of the court, says: "The main point (on a motion to dissolve an injunction) is, not whether an injunction should be imposed at all, for that has already been done, and after a full hearing, and till the contrary is shown, it is to be presumed it was done rightly." *Several authorities cited.* He then proceeds: "The burden is on the respondent to overcome that presumption. It is open to be overcome by new matter, or evidence arising since the injunction was imposed; though very seldom by matter then existing which the party then neglected to present to the consideration of the court." The learned judge, after referring to the presumptions arising in the case in favor of the validity of the patent, says: "Such facts, in these preliminary inquiries into the legal title, as connected with the propriety of imposing or dissolving an injunction, are proper and legal ones to influence the decision of the court, and are paramount in their character over all individual opinions of witnesses, and should usually be conclusive till parties contest these in some issues in a court of law, and

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disprove or rebut their force;" and then adds: "Their great strength, when united as here, is entirely superior to any evidence offered against them by the respondent." And this view is the more conclusive as applicable to the present motion, from the fact that the complainant has also taken additional testimony since the hearing, which, to some extent, invalidates and rebuts that offered by the defendants.

The presumptions in favor of the novelty of the inventions and improvements patented to Hussey, which may be supposed to have operated on the learned judge who granted this injunction, can not be overlooked or disregarded in deciding the present motion. They are still in full force, and of sufficient potency at least to neutralize, on this preliminary question, all the evidence adduced by the defendants to show that the patent is invalid on the ground of want of novelty in the improvements for which it issued.

Without dwelling on the various grounds of these presumptions, it will be sufficient to state them very briefly.

They arise: *First*. From the oath of the patentee, that he was the first and original inventor of the improvements covered by the patent of 1847 and the reissues. *Second*. That the Commissioner of Patents, after the fullest investigation of the claims of the patentee as to the novelty and originality of his inventions, granted the patents. *Third*. That Hussey, for more than ten years, was in the undisturbed enjoyment of all the benefits of the exclusive rights granted him by the patent of 1847; that during that time he has made extensive sales of his right to make and use his improved reaper throughout nearly all the grain growing States of the Union; thus evidencing the entire acquiescence of the public, not only in the originality of the invention, but also its great utility. *Fourth*. That as to the patent of 1847, there has been a direct adjudication establishing its validity in a suit in equity brought, in 1857, by Hussey against Cyrus H. McCormick and others in the Cir-

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cuit Court of the United States for the Northern District of Illinois, in which the question of the novelty of Hussey's invention was in question, and strenuously contested by the defendants. *Fifth.* That injunctions have been granted upon the application of Hussey, by the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, restraining sundry persons from the infringement of his patents 449 and 917.

The authorities are numerous to support the position, that when such grounds of presumption exist in favor of the novelty of an invention covered by a patent, courts will not refuse an injunction, or, if granted, will not dissolve it, unless the patent is impeached by the most conclusive evidence. In the case of *Orr v. Litchfield et al.*, W. & M. 18, 2 Robb's Pat. Cases, 323, the court say: "When the complainant has made out not merely a grant of the patent, but possession and use, and sale under it for some time undisturbed, and besides this, a recovery against other persons using it, the courts have invariably held that such a strong color of title shall not be deprived of the benefit of an injunction till a full trial on the merits counteracts or annuls it. In several cases where the equities of the bill were even denied, and in others where strong doubts were raised whether the patent in the end could be sustained as valid, the courts decided that injunctions should issue under such circumstances as have been before stated in favor of the plaintiff, till an answer or final hearing; or, if before issued, should not be dissolved till the final trial, and then cease or be made perpetual, as the result might render just." See numerous authorities cited.

In the case of *Ogle & Whitehead v. Ege*, 4 Wash. 585, 1 Robb's Pat. Cas. 516, the learned judge says: "I take the rule to be in cases of injunctions in patent cases, that when the bill states a clear right to the thing patented, which, together with the alleged infringement, is verified by affidavit, if he has been in possession, having used or sold it in whole or in part, the court will grant an injunc-

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tion and continue it till the hearing or further order, without sending the plaintiff to law to try his right." See also Curtis on Patents, sec. 829.

Many other authorities on this point might be cited; but those referred to seem to indicate very clearly the proper action of the court on the present motion.

It might perhaps be conceded that if the defendants, in support of this motion, had, by their evidence, so clearly and conclusively impeached Hussey's patent, on the ground that he was not the first and original inventor of the improvement patented to him, as to leave no doubt on that point, it might be the duty of the court, against all the presumptions in his favor, to release the defendants from the operation of this injunction. But, in the judgment of the court, the evidence does not make out such a case. I can not now say what may be the conclusion of the court on the point in controversy, after the final hearing between these parties, when all the proofs and evidence shall be adduced. As the case now stands, the defendants rely on their evidence of the prior knowledge and use of the Leland and the Moore & Hascall machines, to establish the want of novelty in Hussey's invention.

As to the Leland machine, it is conceded by the counsel for the complainant that its cutting apparatus is substantially the same as that covered by Hussey's patent of 1847.

The evidence shows that the first machine made by Leland was in the spring of 1845, and that it was first used in the harvest of that year. Several others were made the next year, with the open slotted fingers, but there is perhaps some uncertainty whether, in the first of these machines, the fingers were open or closed; it is not, however, material whether the open fingers were first used in 1845 or 1846, if, as the complainant insists, the invention of Hussey dates back to 1844. And the evidence for the complainant does prove that Hussey had perfected a machine combining the scalloped cutter with an open slotted finger, in the summer of 1844. The witness, Lovegrove,

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swears that this apparatus was put into a machine for trial during that year, and that Hussey then informed the witness that he had devised the open slotted finger to prevent the cutter from choking. Without intimating any opinion on this question of the priority of invention, I merely refer to it now as showing that the defendants' evidence as to the Leland machine is by no means conclusive to prove that it was of an earlier date than Hussey's invention.

From the evidence, it seems that Moore & Hascall's harvester was first used in the harvest of 1836. It was first made with a straight sickle or cutter; but a scalloped cutter was introduced in 1839. It is insisted by the defendants' counsel that the fingers of this machine had the open slot, substantially as claimed by Hussey.

The defendants have introduced the affidavits of several witnesses to prove the structure and the mode of operation of the cutting apparatus of the Moore & Hascall machine, to show that it had substantially the open slotted finger claimed by Hussey in his patent of 1847. And a finger of one of the machines constructed by Moore & Hascall is in evidence to impeach the novelty of Hussey's invention. I do not propose to give any opinion at this time on the point, nor to examine critically the evidence which bears on it. If there is even a reasonable doubt as to the identity of the fingers of the Moore & Hascall machine, and those claimed by Hussey, it would furnish a sufficient reason for refusing to dissolve this injunction, and for referring the decision of the question to the final hearing.

The harvester, which was the name by which the Moore & Hascall machine was known in Michigan during the time it was in use, was a cumbrous machine, requiring some fourteen or sixteen horses to move it in the field, intended to cut off the heads of the grain, and thresh and clean it by one operation. The fingers of the cutting apparatus were constructed of wood, not less than two and a half feet in length, and framed into the cutter-bar, and plates of thin hoop iron were attached to the upper part of

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the finger, and so arranged as to form a slot, open in the rear, in which the sickle vibrated. The experts, whose evidence has been taken as to the identity of these fingers with the short, iron, open slotted fingers claimed by Hussey, differ widely in their conclusions.

It is not necessary now to decide as to the preponderance of this testimony. It is not improper, however, to advert to the fact that there is not only a palpable difference in the construction of the fingers of the two machines, but also in the mode of their operation. The Hussey machine, in its practical effects, is a reaper and a mower, and cuts the grain or grass near the surface of the earth, while, as already noticed, the Moore & Hascall machine was designed to cut off the heads of the grain.

In the deposition of Moore, one of the inventors of this machine, taken in the case of *Seymour v. McCormick*, as appears from the record of the case, he states that the design of the machine was "*to cut off the grain just below the heads;*" and again, "*it was not adapted to a mere reaping machine.*" And he testified, also, that "*grain cut with my machine would not be in a state that it could be bound up.*" The very intelligent experts for the complainant swear, that, from the structure of the fingers in the Moore & Hascall machine, they are not adapted to perform the office of a reaper and a mower. And it is not unworthy of remark that, in the judgment of the Commissioner of Patents, the prior patent to Moore & Hascall was not regarded as in conflict with the invention of Hussey, patented to him in 1847.

But, without going more fully into the consideration of this question of identity, it is clear the evidence does not so conclusively impeach the novelty of Hussey's invention as to require this court to release the defendants from the operation of this injunction, and I have no hesitation in holding that the defendants are not entitled to the order for which they now ask.

It is stated by their counsel that they are suffering serious injury from the stoppage of their manufactory, under the

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operation of the injunction granted in this case. If this is so, it furnishes no reason for a departure from the well-settled rules of chancery practice in patent cases. Nor, under the circumstances of this case, will the injury of which they complain excite much sympathy in their behalf. It appears they have been making reapers and mowers, with the scalloped vibrating cutter, and the open slotted fingers, since the year 1858, and that they commenced the manufacture with the knowledge that they were infringing Hussey's patent. There is no pretense that they proceeded in ignorance of his patented invention. It appears, from the correspondence of two of the defendants, proved and in evidence, that they were apprehensive they would be held to an account for the infringement, and have been exceedingly vigilant in getting up evidence to impeach the novelty of Hussey's improvements.

The correspondence shows that long before the commencement of this suit they had avowed a purpose of setting Hussey at defiance, and had used the most strenuous efforts to defeat his rights. Among other things, it appears that they had proposed to organize a combination of all those interested in the manufacture of mowers and reapers in the United States who had not taken licenses from Hussey, for the purpose of contesting his claim. They seem to have entertained the hope that a combination of sufficient means and influence could be formed to secure a triumph before any court or jury. I forbear to speak in such terms as the facts might well justify of the spirit and motives which seem to have impelled these defendants in their course in this transaction. I advert to it now to show they were not taken by surprise in the institution of this suit, and in the order for the injunction which has issued. It was precisely what they had long before anticipated, and what they seemed determined to bring about. They have not, therefore, any very well-grounded cause of complaint if arrested for a time in their manufacturing operations.

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The court will see to it that there is no unreasonable delay in bringing the case to final hearing.

Motion to dissolve injunction overruled.

(CIRCUIT COURT.)

DAVID CRANE *v.* W. G. MCCOY ET AL.

It is not enough to defeat jurisdiction in equity that there was a remedy at law; the remedy must be complete, prompt, and efficient.

A chancellor in the exercise of a just discretion, upon an application for an injunction, may properly take into consideration the existence of an actual conflict or imminent danger of a violent collision between two authorities, in determining the expediency of awarding this preventive process.

If the rights of a party can only be enforced at law by long continued, strenuous, and expensive litigation, and those rights can be more promptly and efficiently asserted in equity, a stringent reason is offered for the application of its power.

The sheriff of a county has no right to disturb or in any way interfere with the possession of property legally in the possession of an United States marshal.

The return of an United States marshal is conclusive of the facts which it sets forth, and its truth can not be collaterally impeached.

Property which has been replevied, does not pass into the possession of the plaintiff after he has given a bond which has been accepted by the officer, until there is a formal delivery of the property by the officer.

Where there is concurrent jurisdiction in courts, the tribunal first obtaining jurisdiction of the subject or person shall retain it.

The application for the appointment of a receiver is always addressed to the sound discretion of the court to which it is made. As a general rule, such appointment will be made in all cases where the interests of parties seem to require it.

Lee & Fisher, for complainants.

Mr. Probasco, for defendants.

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OPINION OF THE COURT :

The questions before the court arise on a motion to dissolve the injunction, which has been granted in this case, and to rescind the order for the appointment of a receiver. For obvious reasons it will be improper, in the decision of this motion, to pass on any questions of law or fact directly involving the title to the property in controversy, and which will necessarily come under the consideration of the court on the final hearing.

The bill in chancery in this case was filed on the 4th of January, instant, by David Crane, a citizen of the State of Tennessee. It states, in effect, that on the 1st inst. he purchased twelve hundred and twenty-four barrels of apples, and three hundred and thirty-two barrels of onions of D. Harper & Son, commission and produce merchants of Cincinnati, for the sum of \$2,429.81, for which he gave his two negotiable promissory notes for equal amounts, payable in thirty and sixty days; that he was in possession of said articles, and had shipped a part of the apples to Nashville, his place of business, and had sold a few barrels in Cincinnati; that on the 2d of January, W. G. McCoy and Roswell Gould sued out of the Superior Court of Cincinnati a writ of replevin against D. Harper & Son, upon which the sheriff of Hamilton county took one thousand one hundred and seventy barrels of said apples and delivered them to said McCoy and Gould; that said Crane thereupon sued out of this court a writ of replevin for said apples against said McCoy and Gould, and they were taken by the marshal and were in his possession when Libbeus L. Harding obtained a writ of replevin from said Superior Court of Cincinnati against said Crane and Lewis W. Sifford, the marshal, and that by the aid of a posse, and by forcible means, the sheriff of Hamilton county intervened to prevent the delivery of said property by the marshal to the said Crane; that a collision had already occurred between the marshal and the sheriff, and that bloodshed was anticipated in the attempt by the marshal to retain possession,

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and the attempt of the sheriff to deliver the property to said Harding.

The bill further alleges, that the purchase by said Crane of Harper & Son was in good faith, and for a full consideration; that said Harding has no just claim to the property and never was in actual possession thereof; that said apples are perishable; and in view of the collision which had occurred, the further violence threatened, and the further and endless litigation likely to ensue from the conflict between the marshal and the sheriff, and for the protection of the rights of said Crane, he prays the court to appoint a receiver to take possession of the property, and hold the same subject to the further order of this court, and that an injunction issue restraining the sheriff of Hamilton county, and all other persons from further interference with said property, until the rights of all the parties can be finally settled.

The bill is duly verified by the oath of the complainant, Crane, and as to some of the facts, by the affidavit of William M. Manson, the deputy marshal intrusted with the execution of the writ of replevin issued from this court. On the 4th of January, instant, an order for an injunction and the appointment of a receiver was made by the judge of this court. In pursuance of that order an injunction bond in the sum of three thousand dollars has been duly executed and filed by said Crane, and a writ of injunction has been issued and served. The receiver appointed by the court has accepted the appointment and taken the necessary oath, and given bond for the faithful performance of his duties, in the sum of \$3,000. He has also filed his first report setting forth that he is in possession of the property, and pursuant to the order of the court, has given public notice that said apples will be offered for sale on the 14th of January, instant.

Several affidavits have been filed by the defendants to prove that the complainant, Crane, never had any legal title or claim to the property in question. These affidavits are

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presented in behalf of L. Harding, who is a defendant in this bill, and who is the plaintiff in the last action of replevin brought in the Superior Court of Cincinnati to obtain possession of the property. These affidavits show a sale of the apples by D. Harper & Son to McCoy & Co. on the 14th of December last on terms set out in the affidavit of McCoy; and that on the 15th of December, Henry Harper, one of the firm of Harper & Son, for reasons which do not appear, notified McCoy & Co. that he would not abide by the agreement made on the preceding day for the sale of said apples. It also appears that there was a controversy as to the right of property, as between said Harper & Son, and said McCoy & Co.; the latter claiming a right thereto, and the former denying their right, and asserting property in themselves; that while this controversy was pending, the sale of the apples was made by Harper & Son to Crane, and possession given, though the apples still remained in the warehouse of Harper & Son, on Walnut street; that on the 2d of January, McCoy & Co. sued out a writ of replevin from the Superior Court of Cincinnati, under which the sheriff took the apples, and delivered them to McCoy & Co., who gave a bond, as required by the statute, with J. W. Patrick and L. Harding as their sureties; that McCoy & Co. assigned to said Harding the sheriff's order on Harper & Son for the delivery of said apples; that on the 3d of January the complainant, Crane, sued out his writ of replevin from this court against said McCoy & Co., under which the marshal took the apples still remaining in the warehouse of Harper & Son, and upon the execution of a delivery bond by said Crane was attempting to deliver possession to Crane; that on the same day, January 3, the said Harding claiming possession under an assignment of the delivery order given by the sheriff to McCoy & Co., as already stated, sued out a replevin from the Superior Court of Cincinnati, in the service of which, by the sheriff, the difficulty or conflict, which will be hereafter noticed, occurred. And at this stage of the proceedings, the complainant, Crane,

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filed his bill, invoking the aid of this court as a court of chancery.

The defendants have filed their motion to dissolve the injunction, and to rescind the order for the appointment of a receiver. The grounds of this motion are substantially: 1. That the court had no jurisdiction to award an injunction, and appoint a receiver; 2. That there was neither in law nor in fact any conflict between the marshal and the sheriff, rendering the interposition of this court proper or necessary; 3. That the sheriff has lawfully a right of possession, as against the marshal and the complainant Crane.

In adverting to these grounds for dissolving this injunction, it will not be necessary, and perhaps would be improper, on this preliminary motion, to attempt minutely to consider all the facts presented to the court by the affidavits and exhibits in the case. The questions presented as to the title to this property will come more properly before the court on the final hearing, and can not now be satisfactorily settled on the *ex parte* evidence presented by the parties. If the judge, in the just exercises of his powers as a chancellor, had jurisdiction to make the order in question, and a case is made, which, *prima facie*, justified the allowance of an injunction, and the facts now before the court require, for the purposes of equity, that the injunction should not be dissolved, the present motion can not prevail.

If, as insisted by the defendant's counsel, the judge had no rightful jurisdiction to make the order in question, the injunction must be dissolved. The objection on this ground is that the complainant had an adequate remedy at law, in the action of replevin which was pending, or by an action of trespass against the plaintiff in the action of replevin, and the sheriff who executed the process, if they were wrong-doers. The sixteenth section of the judiciary act of 1789, 1 U. S. Stat. 82, prohibits suits in equity where there is a plain, adequate, and complete remedy at law. The construction of this statute has frequently been under

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review by the Supreme Court of the United States. In the case of *Boyce's Ex'rs v. Grundy*, 3 Peters, 210, the court say, in reference to that section, that it had been often and uniformly held, "that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate; or, in other words, as practical and as efficient to the ends of justice, and its prompt administration, as the remedy in equity." It will not be necessary to refer to other cases in that court, in which the same doctrine has been even more broadly recognized and asserted. It is not enough to defeat jurisdiction in equity, that there was a remedy at law. The remedy must be complete, prompt, and efficient. And it requires no argument to show, in reference to the case before the court, that the law did not afford such a remedy to the complainant. In the first place, without noticing specially all facts, it is clear that at the time the order for the injunction issued, a collision had occurred between the marshal and the sheriff. The marshal asserted his rightful possession of the property, and the sheriff insisted on his right to take it from his possession, under the process from the State court, and was prepared to enforce that right by the use of force, if necessary. Now collisions between the Federal and State authorities are always unpleasant, and greatly to be regretted, and, when possible, to be avoided. And, it seems to me, the complainant by resorting to the peaceful remedy of an injunction, and thus avoiding further, and possibly violent and bloody conflict, is entitled to commendation rather than censure, and has not thereby injured his standing in a court of equity. It is also clear, that a chancellor in the exercise of a just discretion, upon an application for an injunction, may properly take into consideration the existence of an actual conflict, or imminent danger of a violent collision between the two authorities, in determining the expediency of awarding this preventive process. And so, too, if the rights of a party can only be enforced at law by long

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continued, strenuous and expensive litigation, and those rights can be more promptly and efficiently asserted in equity, a stringent reason is offered for the application of its power. In reference to the controversy between these parties, it is obvious that there would have been much litigation at law, before their rights could have been finally settled; whereas, by a resort to a court of chancery, all necessary parties being brought in, the rights of all can be fully and satisfactorily adjusted.

But it is further insisted in support of the present motion, that this court had full power, as a court of law, to enforce its own process, and protect its officers in the execution of that process. There is no doubt of the existence of this power in this court. If its officer is obstructed or interfered with in the just exercise of his duties, the court may interpose and punish such unwarranted interference, as a contempt of its authority. But, for many obvious reasons, the exertion of this power is to be avoided, unless there is the most stringent necessity for it. And especially is this true, when the conflict of authority may involve the courts of the Union and the courts of a State in embarrassing and unpleasant collisions.

I will, however, pursue this subject no further. I am clear in the opinion, that in view of the facts of this case, as set forth in the complainants' bill, and as they appear from the affidavits and exhibits in the case, the order for the injunction was a proper exercise of a jurisdiction pertaining to a judge of this court, in the exercise of his powers as a chancellor. And in this connection, I may properly notice the fact, that his honor, Judge McLean, on one occasion within my recollection, strongly stated it as his opinion, that as a general rule in these conflicts of jurisdiction involving the right to the title and possession of property, the remedy afforded by a court of equity is greatly to be preferred to protracted and vexatious litigations at law.

The views thus presented, are upon the assumption that the marshal, at the time the sheriff attempted to serve

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the writ of replevin sued out by Harding against Crane and Sifford, was in the lawful possession of the property in question, and that the sheriff, therefore, had no right to seize it on the process in his hands; and that his attempt to seize it, under the circumstances referred to, and in view of the probable results of his action, presented a state of affairs rendering it proper and necessary for Crane to resort to chancery, and justifying the order of the court made in the case. It is insisted, however, by the counsel for the defendants, that there is nothing in the facts before the court from which the inference can be fairly drawn, that there was any actual conflict as between the marshal and the sheriff. It is argued, that the property, when the sheriff attempted to serve the writ of replevin sued out by Harding, was in the possession of Crane, and not of the marshal, and therefore subject to seizure by the sheriff under the writ in his hands. If this proposition is sustainable, it is clear the sheriff had a right to take the property, and the marshal was wrong in making any opposition to it. If, on the other hand, the property was legally in the possession of the marshal under the writ of replevin issued from this court in the case of Crane against Gould and McCoy, the sheriff had no right to disturb or in any way interfere with the marshal's possession. How stands the fact as to the possession of this property at the time the sheriff attempted to serve the writ of replevin? The return to the writ issued from this court, in the case of Crane against Gould and McCoy, sets forth, that the marshal by his deputy, pursuant to the command of the writ, took 1,174 barrels of apples, and caused them to be duly appraised; and having taken a delivery bond from the plaintiff, Crane, pursuant to the statute, he commenced the delivery of the property to him, and had delivered seventy-five barrels, when he was obstructed and prevented from delivering the other part by the interference of the sheriff of Hamilton county, and others. He then recites the fact that a receiver had been appointed by this court, who has in possession 1,099 barrels of the apples.

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This return clearly shows that no more than seventy-five barrels were delivered to Crane, and that the balance remained in the possession of the marshal, and passed from him into the possession of the receiver. This return of the officer is conclusive of the facts which it sets forth, and its truth can not be collaterally impeached. And it proves that as to 1,099 barrels of the apples, the possession was in the marshal, and not in Crane. And being thus in the hands of the marshal, under legal process, the sheriff had no right to take them under the writ of replevin in his hands.

It is insisted, however, that by operation of the statute of Ohio, upon Crane's giving bond to the marshal, the property replevied passed into the possession of Crane, and was therefore subject to the operation of the sheriff's writ of replevin. On this point no authorities were cited, and it may be presumed there are none to sustain the position. In the absence of any authoritative decisions to the contrary, I incline to the opinion that after the bond is given and accepted by the officer, there must be a formal delivery of the property by the officer. The return of the officer before referred to, shows only a delivery of seventy-five barrels of the apples. It is insisted in argument, that this partial delivery by the marshal is by implication to be deemed as a delivery of all the apples to Crane, and that the possession thereby passed to him, and was subject to the action of the writ of replevin sued out by Harding, and it is also contended that the giving the delivery bond by Crane, and its acceptance by the marshal, transferred the possession to Crane. The return of the marshal showing possession in him of all the apples, except the seventy-five barrels delivered to Crane, is to be viewed as conclusive of that fact, and the point referred to is not material in the decision upon the question before the court. It was no doubt competent for the marshal to have delivered the entire quantity of the apples in bulk, as they there remained in the warehouse. But was he bound to make the delivery

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in this way? It occurs to me, that it was in the discretion of the officer in what manner the delivery should be made, and in the exercise of this discretion he was properly controlled by the circumstances of the case. It appears that Crane was prepared to remove the apples to the river landing for the purpose of shipment, and drays were in readiness to take them. The marshal seems to have thought it was his duty to deliver them on the pavement, in front of the warehouse. I am unable to perceive that there can be any legal objections to this mode of delivery, having regard to the facts existing and known to the marshal. These facts warranted the apprehension, that there might be, and probably would be, some interference in the attempt to give the possession to the claimant of the property.

The doctrine that where there is concurrent jurisdiction in courts, the court first obtaining jurisdiction of the subject or person shall retain it, is not controverted, and is too well settled to be disputed. This doctrine applies clearly to the case under consideration. There was a legal possession in the marshal of that portion of the property in question, of which there had been no actual delivery to Crane. That possession could not be rightfully interfered with or disturbed by process from another court; and the property was subject to any order which the court having it in possession, might deem it proper to make, in accordance with law and the usages of courts. The application for the appointment of a receiver is always addressed to the sound discretion of the court to which it is made. As a general rule, such appointment will be made in all cases where the interests of parties seem to require it. The posture of this controversy, before referred to, a conflict existing, with an apprehended violent collision, and a probability of fierce and long continued litigation at law, was a sufficient reason for the appointment of a receiver, and the order for the injunction. But in addition to this consideration, the perishable nature of the property in contestation could not be overlooked. The apples were liable to

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rapid decay, and if they were to be the sport of interminable struggles for possession, and cross actions of replevin, before these could be ended, they would be entirely valueless. Hence, it would seem obviously to be for the interest of all concerned, that they should be withdrawn from the operation of such a warfare, and disposed of in a way most advantageous to all. The order for the appointment of a receiver, who has taken an oath for the faithful discharge of his duties, with the superadded security of a bond, amply secures this object. In the meantime, all the questions of title to this property are reserved until there can be a full and final hearing, and a satisfactory decision settling the rights of the parties. The order of the court requires the proceeds of the property to be placed under its order, and it will be paid to those who establish a legal right to it.

Upon the whole, I see no sufficient reason for dissolving the injunction, or vacating the order for the appointment of a receiver. The motion is therefore overruled.

(CIRCUIT COURT.)

**THE UNITED STATES v. ISAAC KERSHNER, WILLIAM MILLS,
AND ELIHU THORN.**

Where a postmaster in a quarterly return shows a balance in his hands, the postmaster-general may apply the balance reported in a subsequent return to the extinguishment of the previous balance.

And where, in an account current continued for years, the postmaster-general thus makes the application of balances reported by a postmaster, any deficiency on final settlement due from the postmaster will be chargeable to and appear in the last quarterly account of the postmaster; and unless two years have elapsed from the return of the last quarterly account to the time of bringing suit on the postmaster's bond, the sureties in the bond are not protected from liability by the provision of the act of Congress requiring suit to be brought within two years, or in case of neglect so to sue, the sureties not to be liable.

United States v. Kershner.

Stanley Matthews, District Attorney, for plaintiff.

King & Thompson, for defendants.

OPINION OF THE COURT:

This is an action of debt, brought by the United States against Isaac Kershner, as the principal, and William Mills and Elihu Thorn, as sureties, in the official bond of said Kershner, as the late postmaster at Yellow Springs, in this State. The breach assigned is the non-payment by Kershner of the sum of \$499.35, which, it is averred, he owes the United States for moneys officially received by him. Kershner does not appear or make any defense to the action; but his sureties, Mills and Thorn, have pleaded, first, the general issue; and secondly, a special plea, in which it is averred that Kershner, as postmaster, "was at all times for more than two years next before the commencement of this action, in default in not accounting for and paying over to the plaintiff the moneys found due and owing from him as such postmaster, agent, and depository of the post-office department." The plaintiff takes issue on the last-named plea, by a replication denying that the default of Kershner, as postmaster, occurred two years before the institution of this suit.

The only evidence in the case is a duly certified transcript from the books of the auditor of the post-office department, showing the state of the postmaster's account, and exhibiting a balance of \$499.35 due from him on March 31, 1859, at which date the account closed and the balance was struck. The first item of charge against Kershner in this account is for a balance due for the quarter ending June 30, 1858; and from that date he is regularly charged with the quarterly balances accruing against him until December 31, 1858, which is the last date in the debit side of the account. The account is carried on continuously from the date of the first entry to the close of the account, when the balance was finally ascertained. The

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credit side of the account is made up of various sums paid by the postmaster between September 22, 1855, and March 31, 1859.

On the part of the sureties, it is insisted that the account current shows that Kershner was in default for a part of the quarterly balances charged against him as postmaster for two years or more prior to the commencement of the suit; and that by the neglect of the postmaster-general to bring suit for such balances within two years after they accrued, the sureties are released from their liability. They rely on sections 31 and 3 of the act of Congress of March 3, 1825, "to reduce into one the several acts establishing and regulating the post-office department." Section 31 makes it the duty of a postmaster to render his accounts, and pay over to the postmaster-general the balance by him due, "at the end of every three months," and failing to do so the postmaster-general is required to bring suit against him. And section 3 of said act, after making it the duty of the postmaster-general to take bond, with approved security, from the postmaster, contains the following proviso: "That if the default shall be made by the postmaster aforesaid at any time, and the postmaster-general shall fail to institute suit against such postmaster and said sureties for two years from and after such default shall be made, then and in that case the said sureties shall not be held liable to the United States, nor shall suit be instituted against them."

The only question in this case arises on the construction to be given to the proviso just quoted. And this involves the inquiry, at what period is the postmaster to be regarded as in default. The present suit was instituted on January 3, 1860; and it is insisted by the district attorney, that as the account current between the United States and the postmaster exhibits an unbroken series of charges against, and credits to, the postmaster from the date of the first item to the close of the account when the final balance was struck, each payment made by the postmaster in the order

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of time in which it was made, is to be applied to the extinguishment of the preceding quarterly balance against him, and the residue, if any, to be credited to the account of receipts for the quarter within which the payment was made. Upon this principle, it will be readily seen that where a payment is made, sufficient in amount to satisfy a prior quarterly balance against the postmaster, the default will be extinguished, and by the operation of this principle the defaults will all be thrown on the last quarter of the account. And hence it will result, that unless the default appearing in the last quarter of the account is of two years' standing, the sureties can not claim the protection of the statute.

On the other hand, it is contended that the legal liability of the postmaster for any quarterly balance against him accrued at the expiration of the quarter; and, that if during the period included in the account current, two years or more elapsed between the reported quarterly balance and the date of the next payment, the statute applies, and the sureties are exonerated.

An inspection of this account shows clearly on what principle it was kept by the post-office department. It exhibits continuous items of charge and credit during the whole official term of the postmaster, the balance showing the whole amount of the deficit when he ceased to hold the office. And in accordance with the construction given to the statute by the post-office department and its established usage in keeping its accounts with postmasters, sureties have not been regarded as exonerated from liability, unless two years or "more had elapsed after the ascertainment of such balance before it was claimed by suit." The mode of keeping the accounts of postmasters and the principle on which the liability of sureties is to be tested, now insisted on as required by a just construction of the statute, would not only result in great practical inconvenience, but in the loss of large sums due the government for which sureties

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are liable in good faith and according to their legal obligations.

But, clearly, the statute does not require a construction which will lead to these results. In no proper sense of the term does it appear, from the account now before the court, that the postmaster was in default for two years prior to the commencement of this suit. It is true, an inspection of the account shows, that as to the first item of charge, being a balance of \$10.91 for the quarter ending June 30, 1853, it was not liquidated until September 22, 1855, being a period of more than two years; but it was fully discharged on that day, together with all the quarterly intermediate receipts charged to the postmaster. This default being thus extinguished, the sureties can claim no protection from liability on that account. For the eight quarters succeeding September 22, 1855, the quarterly deficits were small, and were fully extinguished by the credits to the postmaster during the years 1857 and 1858. It appears, however, that after applying the quarterly receipts with which the postmaster was charged for the year 1858, and a part of the year 1859, and extinguishing all the previous deficits, there was a balance against the postmaster on March 31, 1859, of four hundred and ninety-nine dollars and thirty-five cents, which is claimed in this action. But, as this suit was commenced on January 1, 1860, it is apparent that two years had not elapsed after the occurrence of the default before suit brought; and, as a consequence, the statute which is relied upon by the sureties of the postmaster, as their defense in this action, does not apply.

The case of *Jones v. The United States*, decided by the Supreme Court of the United States in 1849—7 Howard, 681—is decisive of the question now before this court. That was a suit against a surety in the official bond of a postmaster, who set up in a special plea, as his defense, that sundry defaults were made by the postmaster in failing to pay over money received by him while in office, which were

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permitted to remain unclaimed by suit for more than two years. On the trial of the case in the Circuit Court for the Eastern District of Virginia, the district attorney requested the court to instruct the jury in reference to the account between the United States and the postmaster, "that subsequently to any default at the end of a quarter, without any direction by him (the postmaster), or by the postmaster-general, as to the application of any payments by the postmaster, they should be applied in the first instance to extinguish each successive default in the order in which it fell due; and, if by such application of said payments, the jury shall believe from the evidence that all the defaults which occurred two years before the institution of the suit were extinguished within two years after the same were respectively committed, that the act of Congress, which limits the institution of suits against the sureties of a postmaster to two years after the default of the principal, has no application to this case, and can not in any degree affect the plaintiff's right to recover in this action." This instruction was given by the court below, and affirmed by the Supreme Court as correct. In behalf of the sureties, instructions were asked in the court below, to the effect that payments made by the postmaster should be applied to satisfy charges against him for receipts during the quarter within which the payments were made; and that, if there were balances due for previous quarters, payments afterward made could not be applied to their extinguishment; and that if such balances were permitted to remain two years without being sued for, the sureties were discharged from all liability. These instructions, in the judgment of the Supreme Court, were properly refused by the court below.

It will thus be seen, that the case of *Jones v. The United States* involved the precise question presented in this case. In that, as in this case, there was a continuous account between the post-office department and the postmaster, commencing with the first quarter of his official term and ending with his removal from office, showing the debits and

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credits in the order of time in which they occurred, and exhibiting the final balance against the postmaster, for which suit was brought against him and his sureties within the period of two years. In that case the court, after reviewing the numerous authorities on the subject of the appropriation of payments made by a debtor, distinctly affirm the decision in the case of *Kirkpatrick v. The United States*, 9 Wheaton, 724, in which Judge Story affirms the law to be, "that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an application after the controversy has arisen, and *a fortiori* at the time of the trial." And in the same case, the same learned judge further says, that "in long running accounts, where debits and credits are perpetually occurring and no balances otherwise adjusted than for the purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time."

In the case before this court, there is no pretense that the postmaster in making payments gave any directions as to their application, and he must therefore be presumed to have concurred in the application made by the post-office department. And the payments were applied in strict conformity with the law as held by the Supreme Court. Now, it is apparent, that if section 8 of the act of 1825, before cited, is to receive the construction contended for by the counsel for the sureties in this case, it would not only interfere essentially with the prompt and efficient action of the post-office department, but would result greatly to the injury and annoyance not only of the principal in the official bond of the postmaster but also of the sureties. It would require the auditor of the department to state a formal balance against the postmaster at the end of each quarter, which could not be extinguished by payments subsequently made in the absence of special instruction so to apply

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them ; and if no such instructions were given, and any of these quarterly balances remained unliquidated without suit, the effect would be to exonerate the sureties from liability for any part of the defalcation of the postmaster. Remarking upon such a construction of the statute, the Supreme Court say, in the case of *Jones v. The United States*, that it “ would interpose in the way of a debtor obstructions to the voluntary payment of his own debt, and compel the creditor to resort to a reluctant, dilatory, and expensive litigation for its recovery ;” and they say again : “ We can not, therefore, approve an interpretation of the act of Congress like that assumed in the defense, which would require that quarterly balances should at all events, and in opposition to the will of the parties justly inferred from their conduct, remain open and unsatisfied, to become the subject of future contest.” And in another part of their opinion the court, in reference to the mode of keeping these accounts adopted by the the post-office department, say : “ By this application (of payments subsequent to a quarterly balance) any balance which may have existed at the end of a previous quarter was extinguished and sometimes overpaid, and the account thus brought down to a final balance. To this mode of application no just objection can be perceived.” And again : “ The payments being made generally and without any appropriation by the debtors who were thus liable, it was the undoubted right of the creditor to apply them to any sums antecedently due.”

In the conclusion of their opinion, the Supreme Court adopt the language of Judge Hopkinson, in the case of *The Postmaster-General v. Norvell*, Gilpin, 134, which is very direct and explicit on the question under consideration, and is as follows : “ The application of the moneys received in a subsequent quarter to the payment of the debt or balance antecedently due, being perfectly correct and lawful, it follows that no part of the default for which suit is brought accrued two years before ; on the contrary, all the

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balances antecedent to the last quarter were extinguished by the successive payments, and the final balance falls on the last quarter."

Upon this construction of the act of Congress, thus authoritatively given, it is apparent, in the account before the court, that there was no default of two years' standing prior to the commencement of this suit, and, consequently, that these defendants as sureties are not protected by the statute.

Judgment is therefore rendered for the balance stated in the account, with interest from December 31, 1858.

(CIRCUIT COURT.)

JOSHUA COPEN v. SOLOMON FLESHER ET AL.

A demurrer to a bill in equity will be sustained on the ground of the staleness of the claim of title set up to land, when it appears by the averments of the bill that the complainants have slept upon their rights from the year 1810 until the year 1859.

Where such complainants file an amended bill, alleging that for a long time after their rights accrued they were minors residing in different parts of the State of Virginia, and had no knowledge of their rights nor the location of the land until about the year 1841, and were unable until some time after that year to take any steps in the assertion of their rights, such allegations are sufficient to relieve the claim of title of staleness, and to put the complainants on proof of their allegations in that regard.

A bill in equity praying that the equitable title to land may be adjudged to be in the complainant, and that he is entitled to a patent, and also that a certain person may be made a defendant to the bill and may be compelled to disclose the nature of his claim to the land, and by what authority he is in possession, and to account for rents and profits, is liable to the objection of multifariousness in seeking to obtain two distinct objects by the same decree.

In chancery no material fact which has accrued since filing the original bill can be introduced in an amended bill, and a party can only avail himself of such fact by filing a supplemental bill.

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Where such new matter is introduced in an amended bill, it is a cause of demurrer.

Henry Stanbery and Mr. French, for complainants.

J. B. Stallo and Mr. McCook, for defendants.

OPINION OF THE COURT:

The original bill in chancery, filed by the complainant in this case, averred in substance, that he is a citizen of the State of Virginia, and one of the heirs of John Copen, deceased; that on September 20, 1806, a warrant, numbered 5,114, issued from the land-office, at Richmond, to the representatives of said John Copen, in consideration of his services in the Virginia continental line, for two hundred acres of land in the Virginia Military Land District in the State of Ohio; that after the death of said John Copen, the said warrant was assigned by some person, assuming to act as the administrator of said Copen, to one Henry Flesher, who, in the year 1810, caused said warrant to be located in his name as assignee; and a survey was made and duly returned to the land-office at Chillicothe, numbered 5,190; that the assignment to said Flesher was a nullity, and there never was an administrator of the said John Copen, and the said assignment was wholly without consideration; that said Flesher, not being able to obtain a patent for said land, long since abandoned all claim thereto; and that the warrant, while in his possession, was destroyed by fire. A copy of this warrant, obtained from the records of the land-office at Richmond, is offered as an exhibit in the bill.

The bill also avers, that John Copen left several heirs besides the complainant, and that they have released to him all their rights under said warrant, and that he is now the sole owner thereof; also, that said Henry Flesher died leaving several heirs, all of whom are non-residents of the State of Ohio, who are made defendants, and are required to answer the allegations of the bill under oath, and disclose their interest under said warrant. Service has been

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made on one only of the heirs of Henry Flesher, namely, Solomon Flesher, who has appeared and filed his answer, admitting substantially all the allegations of the bill, and disclaiming any interest under the said warrant. The bill prays for a decree, adjudging the equitable interest in the land located and surveyed under said warrant to be in the complainant, and that he is entitled to a patent therefor from the United States.

After the filing of the bill, upon application to the court for that purpose, and on sufficient cause shown, one Edward Fitzgerald, claiming title to the land, was permitted to be made a defendant; and by consent of the complainant's counsel, he filed a demurrer to the bill, which was sustained by the court on the ground of the staleness of the claim of title set up by the complainant, and the absence of any sufficient reason for the great delay which had occurred in asserting the rights of the heirs of said John Copen to the land in controversy. But for the purpose of affording the complainant an opportunity of setting forth the reasons for this delay, the complainant was allowed to amend his bill. And he has filed an amended bill, to which the said Fitzgerald has interposed a demurrer, in support of which it is urged, first, that there is nothing in the amended bill accounting for the great lapse of time which has occurred, and that this objection lies to the amended bill with the same force as to the original bill; secondly, that the amended bill is multifarious, in that it charges the said Fitzgerald with having obtained, and continued in possession of the land covered by said warrant, by deceptive and fraudulent means, and asks a decree setting aside his claim and decreeing the title in the complainant; third, that in the amended bill the complainant alleges that the quitclaim or release from the other heirs of John Copen to the complainant, set up and relied upon by him in the original bill as proof of his title, is invalid and void, and that after the commencement of this suit, namely, in June, 1860, he obtained from said heirs a sufficient and valid quitclaim or release from

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said heirs, vesting in him a perfect equitable title to the land in controversy.

As to the first objection urged to the amended bill, that nothing is averred in it which relieves the claim of the complainant from the charge of staleness, a remark or two will suffice. That the demurrer to the original bill was properly sustained on this ground, I can see no reason to doubt. It appeared, from the averments of the bill, that the heirs of Copen had slept upon their rights from the death of their ancestor, which occurred prior to the year 1810, until the commencement of this suit in the year 1859. Unexplained, this lapse of time would be fatal in a court of equity to the claim of the complainant, and being apparent on the face of the bill, was a sufficient ground for sustaining the demurrer. But the amended bill avers, that for a long time after the issuing of said warrant, and after the assignment to Henry Flesher, the heirs of John Copen, the warrantee, were minors, residing in different parts of the State of Virginia, and had no knowledge of their rights until about the year 1841, and were not apprised until about that time of the location of the land on which said warrant was placed, and were unable, until some time after that year, to take steps in the assertion of their rights. While it must be admitted that the facts stated in explanation of the delay, are somewhat vague and unsatisfactory, they are sufficient to relieve the amended bill from the objection taken to the original bill on the ground of staleness, and to put the complainant on proof of his allegations in that regard.

But I do not see how the objection that the amended bill is substantially liable to the charge of multifariousness, can be ignored as a cause of demurrer. As has been before noticed, the original bill prayed merely that the equitable title to the land might be adjudged to be in the complainant, and that he is entitled to a patent. The amended bill contains substantially the same prayer. But, in addition to this, the complainant prays that the said Fitzgerald may be made a party defendant to the bill, and may be

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compelled to disclose the nature of his claim to the land, and by what authority he is in possession. It is also charged that his possession is unlawful, and without any claim of right, and that he has by fraudulent and deceptive means retained possession for a long time, and by such means has prevented the complainant from sooner attempting to enforce his claim. And it is moreover assumed, that the possession of the said Fitzgerald is to be viewed as a possession for the rightful owners of said land, and that, as their trustee, he is accountable for the rents and profits during the time he has used and occupied it.

There would seem to be no reason to doubt, that the amended bill is liable to the objection of multifariousness. It seeks to attain two distinct objects by the same decree. In one aspect, it is simply a bill asking the court to decree, that the complainant has the equitable title to the land in question, and is entitled to a patent therefor from the government. In this aspect, it is in the nature of a preliminary proceeding, designed to afford a basis for the favorable action of the government. Its object is in this way to vest in the complainant the legal title to the land on which the warrant was laid. In the other aspect, the amended bill asks for an investigation of the claim of title, which the complainant anticipates will be set up by Fitzgerald; and if his claim shall be adjudged untenable or void, that he shall be held to account for rents and profits. It is very plain that these two objects are wholly distinct in their character, and necessarily involve separate and independent inquiries. This constitutes multifariousness in a bill in equity. Judge Story in his Commentary on Equity Pleading, page 244, says, "By multifariousness, in a bill, is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as for example, the uniting in one bill of several matters, perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants, in the same bill." The bill to which

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the demurrer is filed in this case, comes clearly within this definition. This is apparent from the statement alone of the double aspect of the bill.

It is urged, however, that Fitzgerald has been admitted to come into this case as a defendant, at his own request, and by leave of the court, and can not, therefore, object to the structure of the amended bill, on the ground that the matter charged against him is distinct from that set up against the other defendants, the heirs of Flesher. Whether Fitzgerald was properly admitted as a defendant in this case is not now in question. The court, no doubt, in granting the leave to make him a defendant, acted on the supposition that he had an interest in the title to this land, which rendered it proper he should be permitted to file an answer to the allegations of the bill. In making his answer, he would of course be restricted to matters that were responsive to the bill, and could not introduce anything foreign to it, or which would lead to a mere collateral investigation. If, instead of demurring to the original bill, he had filed his answer, I suppose he would have been limited in his response to the facts alleged, and could not by introducing foreign matter, have presented an issue wholly distinct from that presented in the original bill. It would follow that the mere fact that he had been allowed by the court to stand as a defendant, would not permit the complainant, in his amended bill to introduce matters which, under other circumstances, would have been clearly multifarious in their nature.

The amended bill, therefore, for the reason indicated, is objectionable, and the demurrer must be sustained. Not only is this conclusion justified by the well-settled rules of chancery practice, but clearly does not violate the rights or equities of the complainant. If he is successful in obtaining a decree in accordance with the object of the original bill, which will result in vesting in him the legal title to the land, the way will be open for proceeding against Fitzgerald to test the validity of his title and possession, and to obtain

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such equitable or legal relief, as the facts may justify. On the other hand, if he fails in establishing his own title, it is clear he can have no claim against Fitzgerald, and there will be no ground of controversy as between these parties. In either event, it is most obvious that the claim first set up by the complainant must be disposed of before there can be any litigation between him and Fitzgerald.

The third ground of demurrer to the amended bill is also tenable. It is, that in the amended bill, the complainant sets up a title to the land, acquired since the commencement of this suit. This has been already referred to. In the original bill the complainant asserts a release or quitclaim from the other heirs of John Copen, which he repudiates in the amended bill, and relies on a conveyance or quitclaim from them, executed in June, 1860, which was long after this suit was brought. The law seems well settled, that in chancery no material fact which has occurred since filing the original bill can be introduced in an amended bill. The party can only avail himself of such fact by filing a supplemental bill. And when such new matter is introduced in an amended bill, it is a cause of demurrer.

For the reasons indicated, I feel bound to sustain the demurrer to the amended bill.

(DISTRICT COURT.)**THE UNITED STATES v. SIX BOXES OF ARMS.**

By the law of nations where a war exists between two distinct and independent powers, there must be a suspension of all commercial intercourse between their citizens; but this principle has not been applied to the States which joined the so-called Southern Confederacy.

The destination of arms and munitions of war, and the use intended to be made thereof, at the time of seizure, must furnish a test of their status as contraband or otherwise.

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Flamen Ball, District Attorney, for United States.

Lincoln, Smith & Warnock, for claimants.

CHARGE OF THE COURT:

This is an information filed by the district attorney in behalf of the United States, praying for the condemnation and forfeiture of certain property as contraband of war. The information avers, in substance, that six boxes containing guns and other munitions of war, were shipped from the port of Baltimore on May 10, 1861, to Little Rock, in the State of Arkansas; that on the 27th of April last, and ever since, that State, with others, was, and has been, in a state of insurrection, rebellion, and war; and that the ports and places within the same have been declared by the proclamations of the President of the United States under blockade; and that the property specified in the libel was shipped to the State of Arkansas in violation of the blockade and the laws of the United States, and is legally subject to forfeiture as contraband of war. The property has been seized by and is now in the custody of the marshal, under the process of this court.

William J. Syms and Samuel R. Syms, doing business in, and being citizens of the city of New York, under the name of W. J. Syms & Brother, have intervened in the case, and have filed their answer, verified by oath, in which they allege in substance, that on the 15th day of February last, at the city of New York, they entered into a written contract with two individuals, as commissioners of the State of Arkansas, by which they agreed to furnish the articles named in the information at the prices stipulated, together with others not now in controversy of the same character; that pursuant to said agreement, the property was shipped, a part on the 3d and a part on the 9th of April last, from the port of New York, directed to their agent at Little Rock, in Arkansas, by way of Baltimore, and thence westward by the Baltimore and Ohio Railroad; and that the

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articles now in question were taken on the 17th of April, without legal warrant or authority, by a number of citizens at Cincinnati, and a day or two afterward were delivered to the chief of police of said city for safe-keeping, until the circumstances of the shipment could be legally investigated, and were retained by him until seized by the marshal.

The claimants allege that they are loyal citizens of the United States, and that at the date of said shipment there was no blockade of the ports or places within the State of Arkansas, and that none has yet been formally proclaimed, and they deny that the property, either when shipped or seized, was liable to condemnation as contraband of war. They also aver that on the 15th of February, the date of the contract, and for two months subsequently, the State of Arkansas was reputed and believed to be in favor of the Union, and that a convention of the State had voted against secession. They further allege that it was not until about the 25th of April that there were any marked indications of the purpose of the State to secede, and that the act of secession did not pass until the 7th of May, and that about the 25th of April their agent in Arkansas repaired to Cincinnati, countermanded the order for shipment to that State, and ordered all the property not delivered to be returned to New York; and that the claimants thereupon made a contract with the Union defense committee of that city for the sale to them of such of the property as should be returned to that place.

The evidence offered by the claimants sustains the allegations of their answer, as to the sale and shipment of this property and its seizure and detention at Cincinnati. The testimony of George P. Williams, in behalf of the claimants, is before the court. He was the clerk of Lyons & Brother at the time of the contract made with the Arkansas commissioners, and identifies the property libeled as a part of that furnished by the claimants, and shipped by them from New York on the 3d and 9th of April. He proceeded to

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Arkansas in the early part of that month, to receive and deliver the property as the agent of the claimants. He traveled a good deal through the State, and swears that while the sentiment of the people in the southern part of the State was favorable to secession, in other parts they were for the Union; and that assurances were made to him that the State would not secede. He also states that it was not until after the information was received of the proclamations of the president, of the 15th and 19th of April, that there were any decisive indications of the purpose of seceding; and that on the 25th of April he left Arkansas, and proceeded to Cincinnati for the purpose of stopping all further shipments to Arkansas, and that such an order was given, and no further shipments were made. He also states that the claimants agreed to sell the property to the Union defense committee of New York, when it should be returned to that place. The testimony of the witnesses to the state of things in Arkansas, prior to the 25th of April, is sustained by other witnesses offered by the claimants.

On these facts, it is insisted by the district attorney that the articles seized are liable to forfeiture: first, as having been shipped in violation of the President's proclamation of blockade; and second, that the State of Arkansas was at war with the United States, and the property was, therefore, when seized, contraband of war.

The first of these positions is clearly not sustained. The State of Arkansas was not embraced in the proclamations of the President of the 19th and 27th of April, declaring the ports of the seceded States under blockade. The formal act of secession by the State of Arkansas, as before stated, did not take place until the 7th of May. Until after that date the President could not properly declare the blockade of her ports; and trade with her was not, therefore, interdicted on that ground.

But the question still remains whether this property was subject to condemnation as contraband of war on general principles of national law. The affirmative of this prin-

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ciple is strenuously urged by the attorney for the government. Without attempting an extended investigation of this subject, I propose to state some of the reasons which lead me to the opposite conclusion. And in the first place I may remark that there is no question that, by the well-settled rule of the law of nations, where a war exists between two distinct and independent powers, there must necessarily be a suspension of all commercial intercourse between them. When two nations are arrayed in war against each other, every subject and citizen of the one is regarded and treated as the enemy of the other. But does this principle apply strictly to the so-called Southern Confederacy, or to any of the individual States which have joined it? The President of the United States, in all his proclamations and public acts, has cautiously avoided the recognition of the Southern Confederacy as an independent sovereignty, and has properly proceeded on the doctrine that the right of secession has no warrant in the constitution, and that the exercise of the right is simply a nullity; and when attempted to be sustained by arms, it places all who give aid or countenance to the movement in the attitude of rebels against the government. It results from this view, that every citizen of a seceding State is not necessarily to be regarded as an enemy, with whom all commercial intercourse is to be prohibited. The government of the United States has acted on the principle, in the case of Western Virginia and Eastern Tennessee, that the people of these sections, though within the geographical limits of seceded States, are to be viewed as loyal, and entitled to the sympathy and protection of the government.

But this view of the subject seems to have no practical application to the case before the court. At the time of the shipment of the property described in the libel, and at the time of its stoppage at Cincinnati, Arkansas had not seceded from the Union; nor does the evidence warrant the conclusion, that the state of things there was such as to render it probable she would take this course. In fact,

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there were no indications of this until the assault upon and surrender of Fort Sumter had rendered it a political necessity, that the President should call on the States for a force sufficient to subdue the rebellion then palpably existing. This requisition was made on the 15th of April, and included Arkansas as a loyal State, and was followed on the 19th of that month, by a proclamation declaring the seceded States in a state of blockade. These acts, in Arkansas as in other States, excited all the slumbering elements of secession, which in the case of that State culminated in the passage of the ordinance of the 7th of May.

There is, however, a view of the case before the court, which seems clearly to warrant the conclusion, that this property was in no sense contraband of war, when seized as such at Cincinnati. The destination and the use intended to be made of the property at the time of its seizure, must furnish the tests of its status, as contraband or otherwise. If there were grounds for the presumption of a disloyal motive in the sale and shipment of the property, no such presumption is warranted in regard to it, when taken by the marshal on the 23d of May. The evidence already referred to clearly establishes the fact, that the agent of the claimants, upon the first intimation of a probability that Arkansas might adopt the ordinance of secession, repaired to Cincinnati, and promptly directed that the property should not be sent according to its original destination, but should be forwarded to New York. It was not then *in transitu* to Arkansas, nor could it by possibility ever reach that State, as it was under an order for shipment for New York, to be there used in defense of the Union. In the light, then, of this fact, negating, as it does, every presumption of a disloyal or unpatriotic purpose on the part of the claimants, I do not feel that I am justified in a decree, which not only forfeits the property in question, but would place a stigma on their reputation, which their conduct has not merited. And the view here stated is corroborated by the circulars of the secretary of the treasury

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of the 2d of May and the 12th of June. In both these papers, the secretary enjoins great vigilance on the part of collectors in preventing the shipment of contraband goods to seceded States, or where there is just reason to suppose they will be used by persons in rebellion against the government. If satisfied that the property is not intended to be used for any unlawful purpose, they are merely to notify the shipper or his agent of the fact and the cause of the detention. In the order of the 12th of June, this clause occurs: "If any such shipment, personally or by agent, shall satisfy you that the merchandise so arrested will not be sent to any place under insurrectionary control, but will be *either returned whence it came, or be disposed of in good faith for consumption within loyal States, you will restore possession of the same, and allow such disposition to be made thereof, as the parties in interest may desire.*" Under this instruction, with the knowledge that the property of the claimants had been ordered to New York, the officer of the customs would have been fully justified in restoring it, without any further investigation.

The case, then, before the court is that of a loyal citizen of a loyal State, whose property has been libeled for condemnation, and who has availed himself of his legal right to assert his claim, and to show that there is nothing in the facts to warrant a decree of forfeiture. In making this remark, I am not to be understood as intimating that the public officer at whose instance the seizure was made, is in any decree censurable. So far from this, it is probable that under the circumstances supposed to exist, the institution of this proceeding was a proper act of official duty. And I do not see any ground on which a certificate of probable cause of seizure, if applied for, could be refused by the court. But this is a wholly different question from that involving the legal right to the property, and its liability to condemnation and forfeiture. There may be good reasons for the seizure of property; and yet upon a full investiga-

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tion of the facts, no sufficient ground for holding that the owner has forfeited his right to it.

With these views, I can do no otherwise than decree in favor of the claimants, and order the restoration of the property to them.

(DISTRICT COURT.)

ROBERT MCGREW ET AL. v. STEAMBOAT MELNOTTE.

A boat astern attempting to pass one that is ahead, is held to stricter vigilance and greater precaution than are required of the latter.

The boat ahead is under no obligation to give way or to change her course to facilitate the passage of the boat which is astern, and the latter, having a choice of the time and place to pass, incurs all the risk of the attempt.

This principle applies with great force and stringency when the boat making the attempt to pass is lightly laden and easily controlled, and the other is moved with difficulty.

To entitle the libellants to indemnity for their loss, they must not only show that their adversary is in fault, but that in the management of their boat there was no material error to which the collision can be charged.

The absence of a competent and vigilant watch, constantly employed to assist and advise the pilot in his duty, is *prima facie* evidence of fault in the boat thus deficient.

Lincoln, Smith & Warnock, for libellants.

Dodd & Huston, for claimants.

OPINION OF THE COURT:

This is a libel *in rem.* against the steamboat Melnotte, in which damages are claimed for a collision with a coal barge in tow of the steamboat Hornet. The libel is in the usual form, averring that the loss and injury sustained were occasioned by the sole fault of the Melnotte. The answer takes issue on this allegation, and charges that the collision

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was caused wholly by the faulty management of the *Hornet*. The depositions of a number of witnesses have been taken by the parties to sustain the theory of the collision insisted on by each; and, as usual in such cases, the evidence on some essential points is in direct conflict. I have carefully considered the evidence, but do not propose to analyze it critically in stating my views. While this conflict in the statements of the witnesses unavoidably involves the facts in some uncertainty, the conclusion I have reached seems to be well sustained by the preponderance of the testimony offered by the libellants, as fortified by the fair presumptions and probabilities of the case.

The collision took place about eleven o'clock in the night of April 26, 1860, on the Ohio river, just below the village of Newport, on the Ohio side. The *Hornet* is a stern-wheel steamboat, then employed as a tow-boat in the transportation of coal from Pittsburg to Cincinnati. At the time of the collision she was descending the river with seven heavily laden barges, five of which were near the bow, and two directly in the rear of the five, on either side of the boat. It is not controverted that the *Hornet* was properly equipped and manned as a tow-boat, and had the proper signal-lights, in good condition, at the time, and also that there was a light placed in the forward part of each of the front or wing barges.

The *Melnotte* is a passenger boat of considerable power and speed, and, at the time of the collision, was also descending the river. A short distance above the village of Newport, she was astern of the *Hornet*, and attempted to pass that boat, on the Ohio or starboard side, nearly opposite the village. The *Hornet*, with her barges, being about one hundred feet in width, was descending near the middle of the river, probably a little nearer the Virginia than the Ohio shore, and in the usual place for a down boat. The river at that point is not less than four hundred yards wide, and at the time was in a good stage for navigation, there being at least twelve feet of water in the entire width of

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the river. It appears that just below Newport there is a projection of rocks on the Virginia side, extending out some twenty-five yards, and nearly opposite these rocks, on the Ohio side, there is a deposit of logs and snags reaching out some thirty or forty yards from the shore, leaving still a navigable width of more than three hundred yards. There appears to have been nothing to hinder the Melnotte from passing down on the larboard or Virginia side of the Hornet, if her pilot had decided to take that side. In passing the Hornet, a little below Newport, and nearly opposite the rocks on the Virginia side, and the logs and snags on the Ohio side, the larboard side of the Melnotte came in contact with the starboard wing barge of the Hornet with such force as to crush in the planks, and cause it to take water rapidly, and, shortly after, to sink. This suit is prosecuted to recover compensation for the injury to the barge, the coal lost as the result of its sinking, and for the delay and expense resulting from the collision.

The theory of the libellants, on which they claim a decree in their favor, is that the Hornet with her cumbrous tow was at the point of the collision, in her right place, near the middle of the river, and pointing straight down the stream; and that the Melnotte, in passing, suddenly veered from a straight course toward the Hornet, and as a consequence of this erroneous movement, was brought in contact with the barge. On the other hand, the respondents set up in their answer, and insist that the evidence proves, that the Melnotte was in her right place, pointed straight down the river, and that the collision was caused by the improper divergence of the Hornet from her line of navigation toward the Ohio shore.

It is proper to notice here that this is not the ordinary case of a collision between two boats passing in opposite directions. Both were descending the river. And it was the undoubted right of the Melnotte, being a fast passenger boat, to get ahead of the tow-boat. But the law is well settled, that a boat astern attempting to pass one that

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is ahead, is held to stricter vigilance and greater precaution than are required of the latter. The boat ahead is under no obligation to give way, or to change her course, to facilitate the passage of the boat which is astern. And the latter, having a choice of the time and place to pass, incurs all the risk of the attempt, and unless the forward boat is guilty of a clear error of navigation, will be responsible for all the consequences of such an attempt. 1 Abbott Ad. 108. This principle applies with greater force and stringency to a case like the present, where the boat making the attempt to pass is lightly laden, and easily controlled, and the other, from its cumbersome attachments, is moved with difficulty, and requires a good deal of time to effect a change of course. I am not to be understood, in referring to this principle, as asserting or intimating that the *Hornet* is not responsible for any fault of navigation which may be clearly established by the proofs, leading to the collision which occurred. It is noticed solely as justifying a more rigid rule of accountability as applicable to the *Melnotte* than applies to the *Hornet*. For, if from any cause there was difficulty or danger in passing, it was incumbent on the *Melnotte* to have stopped, and to have waited for a more favorable opportunity to effect her purpose.

I proceed to notice, very briefly, the general bearing and aspect of the evidence on the question, to which of these boats is the fault attributable, by which the libellants have suffered loss. It is a familiar principle of the maritime law, that to entitle them to indemnity for the whole of their loss, they must not only show that their adversary is in fault, but that in the management of their boat there was no material error, to which the collision can be charged. To sustain their claim, the evidence of the master and pilot on watch at the time of the collision, and of one of the crew stationed as a watch on the barges, has been introduced. They swear that the *Hornet* was in the proper place of a descending boat, pointed straight down the river, and that the *Melnotte*, just before the collision, veered from

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her course toward the Hornet, and struck the wing barge, as already noticed. The phase of the occurrence thus presented by these witnesses, leaves no doubt as to which boat was in fault. And, if they are entitled to credit, there can be no hesitation in the conclusion that the respondents' boat was guilty of a palpable error, quite sufficient to charge upon her the responsibility for the damage which has been sustained. But the respondents have introduced the depositions of the pilot and carpenter of the Melnotte, and other persons who were on the boat at the time, to prove that there was no divergence from her proper line of navigation, and that the collision is wholly due to a change in the course of the Hornet, by which she was turned from her straight course downward, to the Ohio shore, and thus her starboard wing barge was brought in contact with the Melnotte.

Upon these contradictory views of the facts, the question for decision is upon the preponderance of the evidence. And, really, I can see no sufficient ground for the rejection of the testimony of the witnesses for the libellants as untrue or incredible. These witnesses were in the most favorable position to know the exact course and position of the Hornet before and when the collision occurred. They are before the court without any impeachment of their moral characters, and so far as the court can know, have testified with fairness and candor. It would require the most satisfactory opposing evidence, to justify the court in repudiating their testimony. Now, it is true, that they are contradicted by the pilot of the Melnotte, and others on that boat. The pilot swears positively that his boat was heading straight down the river when the collision occurred, and the other witnesses for the respondents state it as their belief and opinion that such was her course. It is to be remarked, however, in regard to all these witnesses, that they seem not to have been apprised of the proximity of the two boats, until they were within some twelve or fifteen feet of each other. The collision occurred almost instan-

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taneously after, and it is not strange that, from the darkness of the night, and the excitement of the occasion, they should have mistaken the position of the boats, at the moment of, and immediately after the collision.

But if there is any ground for a doubt, arising from the conflicting statements of the witnesses as to the facts connected with the collision, it is removed by the strong probabilities of the case. These directly sustain the theory of the collision, as claimed by the libellants. It is stated both by their witnesses and those testifying for the respondents, that very shortly before the collision, the *Hornet* was in her proper place, and pointed straight down the river. The respondents insist that she suddenly changed her course, and veered toward the Ohio side, and thus struck the *Melnotte*. But she could have had no possible object or motive in such a change of course; and it is exceedingly improbable, that with seven coal boats in tow, rendering it difficult to change her position from side to side, she should have diverged from the course she was pursuing. Besides, it is doubtful, if from the time she is conceded to have been in her right course, to the time of the collision, she could have changed her line of navigation so far as to have been in the position described by the respondent's witnesses, when the collision occurred. Such a movement could not have been made but with great difficulty and a considerable lapse of time. The probabilities, I think, are strongly in favor of the conclusion, that from the darkness of the night, or some other cause, the pilot of the *Melnotte* was apprehensive of running on the logs or snags along the Ohio shore, and to avoid this suddenly turned his boat toward the Virginia side, and thus struck the barge of the *Hornet*.

There is another fact which may properly be adverted to, as bearing on the question of fault. It is clear from the evidence, that the *Melnotte* had no sufficient lookout, preceding and at the time of the collision. The master, whose watch it was, was sick and not on duty, and there was no one on the deck as a lookout, but the carpenter of the

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boat. It was no part of his duty to act in that capacity, nor is there any evidence that he was at all qualified for the duty. It has been often held by the Supreme Court of the United States, that on boats navigating the western waters, a competent and vigilant watch should be constantly employed to assist and advise the pilot in his duties; and that the absence of such a watch is *prima facie* evidence of fault in the boat thus deficient. 12 How. 459; 21 Id. 570; 23 Id. 293. If, in the case before the court, the question of fault was left in doubt, by reason of the conflict in the testimony as to the circumstances of the collision, the want of a competent and sufficient watch on the Melnotte furnishes legal presumption that she was in the wrong.

I am clear, therefore, in the opinion, that the Melnotte must be held responsible for the injury which has resulted from the collision, and accordingly decree against her for damages. These will embrace the value of the coal lost, the cost of repairing the barge, and the expenses of the steamboat during the time she was delayed, with interest from the time of the collision. The evidence on these points seems to be full and clear, and the decree will be for the sum proved, on the basis indicated.

(DISTRICT COURT.)

THE WESTERN INSURANCE COMPANY AND THE FIREMEN'S
INSURANCE COMPANY v. STEAMBOAT GOODY FRIENDS.

By the well-established rules of navigation on the western rivers, an ascending boat has the right to indicate a preference as to her course of navigation, and having done so, the descending boat is bound to conform to her choice as indicated by her signals, unless there are circumstances rendering it improper to do so.

If there are such circumstances, it is the duty of the descending boat so to indicate that the other boat may be navigated accordingly.

It is a paramount law of navigation that a collision must be avoided when it is practicable to avoid it.

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The errors and faults of one boat will not justify another boat in the infliction of an injury to her, unless it was the result of an inevitable necessity.

In a case arising from a collision of boats, it is not enough to relieve from an imputation of fault that there was a pilot in the wheel-house, but there must be some one on deck, charged with the special duty of keeping a vigilant lookout, not in the wheel-house, but on the forward part of the deck, where the best opportunity is offered for observing approaching and passing boats, and who will be able to communicate promptly to the pilot such information as he may need to insure the safety of his boat.

The absence of such lookout justifies a *prima facie* presumption of fault and makes it incumbent on the party against whom the presumption arises, to repel it by clear proof that the fault was on the other side.

Lincoln, Smith & Warnock, for libellants.

Dodd & Huston, for defendants.

OPINION OF THE COURT:

This is a suit *in rem.* against the steamboat Goody Friends, prosecuted in the names and for the use of the Western Insurance Company and the Firemen's Insurance Company, both doing business at Cincinnati, to recover damages for a collision, by means of which the steamboat South Bend was sunk, and is a total loss. The libellants were insurers to the amount of \$9,000, on the boat, and also on portions of the cargo, and both having been abandoned by the owners, the libellants have paid the amount of their respective risks, being in the whole about \$10,000.

The libel contains the usual allegations, that the collision was the result solely of the fault of those having the management of the Goody Friends. The owners of this boat have intervened, and in their answer aver that there was no fault in the navigation of their boat, and that the collision is chargeable solely to the unskillful management of the South Bend.

Although the parties have taken a large mass of evidence, to which I have given a very careful consideration, the points involved in this controversy are not numerous; and in stating the conclusions at which I have arrived, I do

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not propose a very full or critical analysis of the facts. As usual in collision cases, there is conflict in the evidence adduced by the parties, as to the course of the boats immediately preceding, and at the time of the collision, and also as to the place at which it occurred.

The collision took place between five and six o'clock, in the morning of December 13, 1860, in the Mississippi river, some forty miles above Memphis, nearly opposite the lower end of Island No. 86. The South Bend, a stern-wheel boat of about 275 tons burden, and having on board a cargo estimated at about two hundred and fifty tons, had been laden at Cincinnati, and was destined for different ports on the Arkansas river. The Goody Friends is also a stern-wheel boat, of about the same class as the South Bend, and was on an upward trip from New Orleans to Cincinnati, and other ports and places above, fully laden with a cargo of cotton and other products of the South. The morning in which the collision happened was dark and misty. The stage of water at the time was sufficient for safe navigation, there being between thirteen and fourteen feet in the shoalest channels of the river. The Mississippi, at the place of collision, was at that stage of water, something more than four hundred yards in width. On the Arkansas side, there was a bar some five miles in length, and on the Tennessee shore, there was a deep bend corresponding nearly to the curvature of the bar on the opposite side. The proof is full and clear, that from the outer line of the bar to the Tennessee shore, the water is deep, and sufficient for the safe navigation of boats of a much larger size than the South Bend or the Goody Friends. The depth of the river where the South Bend sank is not less than thirty feet.

The theory of the collision, as claimed by the libellants, is, that when the boats were distant from each other about one mile, or a mile and a half, the pilot of the South Bend noticed the Goody Friends ascending, as he supposed, along or near to the Tennessee shore, and shortly after he heard from her a signal of one blow of the whistle, indicating her

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intention to keep up that shore, and that the South Bend should take the other side; and that the pilot of the South Bend responded to this signal by one blow of his whistle, signifying his acceptance of the Goody Friend's signal; and that in accordance with these signals, he steered his boat quarteringly toward the bar on the Arkansas side, and that while thus steering, the Goody Friends turned nearly square across from the Tennessee shore, and struck the South Bend with her stern on the larboard bow between the forward hatch and the fire-doors, making a large hole in her hull, which admitted such a rapid inflow of water that she sunk in from two to three minutes after the collision.

On the other hand, the respondents allege and insist, that they have clearly proved that the Goody Friends, when her pilot first saw the South Bend, the boats then being a mile and a half apart, was coming up the Arkansas shore, the usual place of an ascending boat, and gave *two* distinct blows of his whistle to indicate his wish to keep up that shore, and that the South Bend should keep the other side. This signal, the respondents allege, was replied to by two distinct blows of the whistle of the South Bend, indicating the acceptance of the signal of their pilot, and that under these signals it was the plain duty of the South Bend to have kept down the bend near the Tennessee shore; but that in violation of the signals and the rules of navigation, her pilot steered his boat along the bar, and at a point not exceeding one hundred yards from the bar, and very near the proper place for an ascending boat, came in contact with the Goody Friends, thereby making a hole in her bow which caused her to sink immediately.

From this statement, it is apparent the theories of the parties, as to this collision, are in direct conflict; and, it is clear, that both can not be true. And it becomes the duty of the court, in the light of the evidence, to determine which way the scale shall preponderate. In this inquiry it is important to ascertain what signals passed between these boats. The only witness on this point for the libellants is Squire Patterson, the pilot of the South Bend, on duty

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before and when the collision took place. He states, in substance that he discovered the Goody Friends when a mile or a mile and a half below, coming up, as he supposed, in the Tennessee bend. He says he thought then she was in the wrong place for an ascending boat, and supposed it was her intention to land at a wood-yard in the bend; and that he heard one whistle from the ascending boat, to which he replied by one blow of his whistle; and according to these signals, steered his boat quartering toward the bar, supposing it was the purpose of the other boat to keep the Tennessee shore. And this would have been correct navigation if the signals had been as he states he understood them. But the court is forced irresistibly to the conclusion, that Patterson, either from misapprehension or design, has not stated the truth in regard to the signals that passed between these boats. Harrison, who was the pilot of the Goody Friends, states that the signal from his boat was two distinct blows of her whistle, indicating his wish to keep the usual place of an ascending boat, near to the Arkansas bar. Logan, who was with Harrison in the wheel-house, a pilot of long experience on the river, states that he gave two loud and distinct whistles, by the direction of Harrison. And both these witnesses say that the response to their signal from the South Bend, was two loud and distinct whistles. These statements are corroborated by other witnesses—one of whom was on the South Bend—and leave the evidence of Patterson wholly without support. It is also clear that he was altogether mistaken in his conclusion that the Goody Friends was coming up the Tennessee bend when her pilot first gave his signal. The testimony, as well as the probabilities of the case, sustain the inference that she was on the Arkansas side when the signal was given.

By the well-established rules of navigation on the western rivers, the ascending boat has a right to indicate her preference as to her course of navigation. And, having done so, the descending boat is bound to conform to her choice as indicated by her signals, unless there are circum-

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stances rendering it improper for her to do so. And if there are such circumstances, it is her duty so to indicate, that the other boat may be navigated accordingly.

This view of the evidence leads to the conclusion, beyond any reasonable doubt, that the pilot of the Goody Friends gave the proper signal, at the proper time, indicating his purpose of keeping up the Arkansas shore, and his desire that the descending boat should run down on the other side.. There is no controversy as to the right of the ascending boat thus to make known her preference; and it is clear that the descending boat, having accepted this signal, was bound to run in accordance with it. That the South Bend was not so navigated is established by the testimony of the witnesses before referred to, who concur in saying that she did not keep down the Tennessee shore, but kept nearer the Arkansas bar than the other shore. Indeed, it would result from the evidence of Patterson, the pilot of the South Bend, that such was his course of navigation. It was in accordance with what he says he understood the signals to require.

But if there was any doubt upon this point, there is one fact in the case that renders it entirely certain. I refer to the position of the wreck of the South Bend. It is true, there are several witnesses—some eight or nine in number—who express the opinion that the wreck is near the middle of the river, somewhat nearer the Arkansas than the Tennessee shore; but, on the other hand, there are eleven witnesses who locate the wreck at from seventy-five yards to one hundred yards from the Arkansas bar, and between three and four hundred yards from the Tennessee side. And they concur in the statement that it lies very near the usual track of an ascending boat. The great discrepancy in the estimates of the distance of the wreck from the bar as given by some of the witnesses for the libellants, and those examined by the respondents, is not easily accounted for. There is undoubtedly a wide difference in these estimates. And there is no reason to infer that the witnesses

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for either party have intentionally falsified the truth. Of the eleven witnesses who were offered by the respondents and interrogated on this point, there is an entire concurrence of opinion that the wreck lies much nearer the Arkansas than the Tennessee shore; and while they differ to some extent in their estimate of the distance, they are unanimous in the opinion that the place of the wreck is very near the line of navigation of an ascending boat, in that part of the river. This is really the material point of the inquiry; for it results inevitably that if the collision happened upon or near the usual track of an up-stream boat, the South Bend, as a descending boat, was out of her proper place. I can see no sufficient reason for rejecting the testimony of the numerous witnesses for the respondents who have testified on this point. They are men of great practical knowledge and experience in the navigation of the Mississippi, who passed the wreck frequently, both in ascending and descending the river. They had the best means of forming a correct judgment of its location, and of deciding whether it was, or was not, near the course of an up-stream boat. And they have testified on this point, with great intelligence, and without any motive, from interest or otherwise, to misrepresent the facts. Some of them state distinctly that the wreck was so near to the Arkansas bar that they deemed it unsafe in ascending to run their boats between the wreck and the bar. Without, therefore, going into a more minute examination of the evidence on this point, I can not hesitate to conclude that with reference to the signals, as proved to have passed between these boats, the South Bend was in fault in not keeping down the bend, at a distance not exceeding one hundred and fifty yards from the Tennessee shore.

To avoid the inference of fault in the navigation of the South Bend in not keeping the proper course of a descending boat, as indicated by the place of the wreck, it is insisted by the libellants that the South Bend was moved by the force of the blow received from the other boat some

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yards or more from the place of the collision toward the bar, and that this explains, in part, the proximity of the wreck to the bar. The witness, Patterson, states that the South Bend moved from fifty to one hundred yards after the collision before she sank. But this statement is not sustained, either by the evidence or the probabilities of the case. While it is undoubtedly true that the Goody Friends struck the South Bend with great violence on the larboard side, a little forward of the boilers, and as the result her stern swung quickly round, so that the boats were side by side, with their bows pointing up stream, it is impossible to conceive that the effect would be to move the stricken boat any considerable distance toward the bar. She was heavily laden, and sunk in two or three minutes after the boats came together. The intelligent experts who have been examined on this point state explicitly that the South Bend could not have moved half her length between the time of the collision and the time she sunk.

It is insisted by the proctor for the libellants, that the pilot of the South Bend navigated his boat in accordance with the signals as he understood them, and therefore was not in fault in keeping down near the bar. But as already remarked, Patterson is not sustained in his statement as to the signals; and as other persons on both the boats swear positively that there were two loud and distinct whistles from each of the boats, I am slow to believe that he had any ground for inferring that the signals were as he says he understood them. But, if it is conceded that he was at the moment under a misapprehension as to the signals, he failed in his duty as a vigilant pilot in not sooner ascertaining and rectifying his mistake. He states that the boats were about a mile or a mile and a half apart when he first discovered the Goody Friends, and that in a minute or two after he heard her signal. After the signals had passed, they were probably near a mile apart. Whatever may have been his impression before as to the position of the ascending boat, an attentive observation of her course

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would have satisfied him that she was coming up the bar shore; and, if he had a doubt on this subject, he should have stopped his engine and repeated his signal. There was time enough to have done this before the boats were in dangerous proximity. But he failed altogether to repeat his signal, and only gave the order to stop and back when the boats were but four hundred yards apart, and when it was too late to avoid the collision. There was in this a failure of vigilance and of prompt action, that puts him clearly in the wrong.

It is urged, however, by the libellants, that if the South Bend was in fault in the particulars referred to, there were also faults in the management of the Goody Friends of sufficient magnitude to constitute this a case of mutual fault calling on the court for a decree apportioning the damages to each of the boats, in accordance with the familiar doctrine of admiralty in such cases. I will therefore briefly consider this point.

It has already been stated that the Goody Friends, in coming up the Arkansas bar, was navigated not only in accordance with the signals which passed, but according to usage of the river as observed by pilots at that place. It seems clear, however, that the pilot is justly chargeable with the same want of vigilance and promptness, which is imputed as a fault to the other boat. When he noticed, as he was bound to notice, that the South Bend was pointing toward the Arkansas bar, and not going down the Tennessee Bend, as the signals required, it was his duty to have repeated his signals, and to have stopped his boat, until he should obtain a proper understanding of the intention of the pilot of the descending boat. As in the case of the South Bend, so in that of the Goody Friends, there was time enough to have done this, and there is no sufficient excuse for not having done it.

But there is another question of graver import, and, perhaps, of more difficulty than any of those which have been noticed. That question is, whether the Goody Friends was

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not in fault in not stopping and backing before the boats were so nearly in contact, as that a collision was inevitable. The evidence is very clear, that the orders of the pilot first to stop, and then to back, were not given until it was too late to put the latter order in execution. The engineer of the Goody Friends states positively, that when the order to back was received by him, there was no time to back, as the boats were then in close proximity, and that his engine was not reversed at all.

There seems to be no reasonable ground for doubt, as to the course and position of the boats at the time of the collision. It is impossible to account for the character of the injuries to the boats, without supposing that when they came together, the South Bend was quartering toward the Arkansas bar, and that the Goody Friends in her upward course, at a greater or less angle, was pointed toward the bar. There is, therefore, no foundation for the theory urged by the respondents, that the bows of both boats were quartering up stream when they came together. It is impossible from the evidence before the court to conceive that the boats could have been in such a position. Patterson swears that the Goody Friends struck his boat nearly at right angles, and that her course was nearly square across the river at the time. In this, however, he is contradicted by the witnesses for the respondents. And, if the manner of their approach, and the angle at which these boats came in contact, depended on the evidence solely of those who profess to have been eye-witnesses of the transaction, I should have been in great doubt as to these facts. Probably the weight of the testimony would have preponderated in favor of the respondents. But there is evidence in the case, which, if credible, must be conclusive of two facts: first, that the Goody Friends was nearly, if not altogether, under full headway when she struck the South Bend; and second, that she came into her nearly at a right angle. The evidence to which I refer is that of the witness Rooney. He was in the employ of the Missouri Wrecking Company,

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as a submarine diver, and with a boat and the usual apparatus for that purpose, visited the wreck a few days after the collision, with the view, if practicable, of raising the boat, and recovering the cargo. In this capacity, by means of a diving bell, Rooney made repeated visits to the sunken boat, fully explored every accessible part of the wreck, and succeeded in saving parts of the cargo. He states that he examined the breach made in the South Bend by the collision, and describes it as extending from fifteen to twenty feet along the larboard guard and upper portion of the deck, and downward some four feet below the water-line, and within a short distance of the knuckle, and inward about twelve feet, or two-thirds of the distance from the outer edge of the boat to the keelson, and that the whole breach is triangular in shape, the widest opening being at the top. He also states that the point where the Goody Friends struck the South Bend was on the larboard side, between the front end of the boilers and the forward hatch. He also testifies that the planks of the boat along the outlines of the break were not smashed or pushed in, and that, in his language, it is a clean cut. He gives it unequivocally as his opinion, that the South Bend was struck by the stern of the Goody Friends, nearly square, or at a right angle, and moreover, that she struck with great force. This he infers from the character of the cut or break, and the effect produced on such parts of the cargo as were struck by the stern of the boat in its inward progress. He states that a box on the deck of the South Bend, containing hardware, being mostly tools and implements of iron, was penetrated and split by the force of the blow, and also other facts, tending to prove the great violence of the collision.

These are probably all the facts stated by this witness to which it is material to refer. If he is credible, the facts which he states justify the conclusion already indicated as to the character of this collision. And there is nothing before the court impeaching the credibility of his evidence.

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His manner as a witness indicated intelligence and candor. He has no interest in the event of this controversy, and so far as the court can know, no motive to depart from the line of truth. From his own statements, he has been long employed, as a diver, in raising sunken boats and cargoes, and seems to be entirely familiar with such operations. It is true, that in his explorations in this department, he has not the advantage of an ocular sight of the objects with which he has to deal in the water. The turbid water of the Mississippi does not enable him to see those objects, and he is necessarily guided in his explorations and labors solely by the sense of feeling. But an intelligent and experienced diver would probably find no difficulty in determining the forms and dimensions of the submerged subjects of his examination. In a word, I can perceive no sufficient reason for repudiating the evidence of the witness Rooney. That this testimony has an important bearing on a vital question connected with this controversy, is too clear for doubt. It throws a strong light on the inquiry as to the actual position of the boats at the moment of collision, and the probable angle at which the Goody Friends approached and ran into the South Bend. And thus viewed, it relieves the case from some of the doubts, in which the other evidence involved it.

It is too clear for controversy, that although the previous navigation of the South Bend was faulty, and she was not in the proper place of a descending boat, yet if it was in the power of the other boat to have avoided the collision, and from negligence or want of skill her pilot failed to do so, she must be held responsible for the consequences. It is a paramount law of navigation, that a collision must be avoided when it is practicable to avoid it. That one boat has been guilty of errors or faults will not justify another boat in the infliction of an injury to her, unless it was the result of an inevitable necessity. If, therefore, in the present case, the pilot of the Goody Friends, as these boats neared each other, and the danger of a collision was imminent, neg-

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lected any measure of precaution within his power, which, if resorted to, would have prevented it, or rendered it harmless, his boat must bear a portion of the responsibility of the injury.

As before noticed, the respondents' theory of the collision is that the South Bend suddenly came out from the Tennessee shore, and steered nearly straight across the river, striking the Goody Friends nearly at right angles. But Rooney's evidence clearly contradicts this theory. It is impossible the break he describes could have been made in that way. On such a supposition, the break would have been made in the starboard side of the Goody Friends by the stern of the South Bend striking and cutting into her, whereas, the break was on the larboard side of the South Bend, between the fire-doors and the forward hatch. This strongly sustains the claims asserted by the libellants. The South Bend must have been pointed down stream at the time, quartering, perhaps, toward the bar, and while in this position the Goody Friends must have struck her, with force sufficient, and at such an angle, as to have made the clean inward cut described by Rooney. This conclusion is fortified by the fact which is clearly proved, that the South Bend, at least three minutes before the collision, had been backed, and had very little, if any, headway when struck. On the other hand, it is clearly established that the headway of the Goody Friends had not been checked, and that the entire force expended in the collision proceeded from her.

And now the question presented is, was it in the power of the pilot of the Goody Friends to have prevented the collision by stopping and backing his boat at the proper time? In this connection, it may be remarked that it is in accordance with the expressed opinion of one witness, sustained by the strong probabilities of the case, that if the latter boat had stopped and backed as soon as did the South Bend, either the collision would not have occurred, or, if it did occur, would have produced no injury to either boat.

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The witnesses, Harrison and Logan, who were in the pilot-house, say they did not notice when the South Bend started across from the Tennessee side. This certainly proves a want of vigilance on their part. It was their duty to have watched every movement of the descending boat till all danger of collision had passed away. But a still more glaring neglect of duty is found in the fact that when they became aware that the South Bend was crossing toward them, and that there was danger of a collision, they waited one minute before the order was given to stop and back. Now, if the Goody Friends was running at the rate of seven miles an hour, she would have run about two hundred yards in that minute, and would have been by that distance nearer the other boat than when the danger was perceived. The value of one minute of time, under these circumstances, can be readily appreciated. If the order to back had been given and obeyed one minute sooner, the headway of the boat would have been nearly, if not wholly, checked, and this disastrous collision would have been prevented. When the order was given, the boats were so near that the engineer of the Goody Friends states there was no time to back, and that his engine was not reversed. I can come to no other conclusion than that this delay in backing was the immediate cause of the collision, and that there is nothing in the facts of the case which excuse it. It involved the omission of a plain duty, and was not a merely harmless error.

In addition to the evidence referred to, sustaining, in my judgment, the conclusion that there was a culpable want of promptness in stopping and backing the Goody Friends, there are two collateral considerations which have significance as warranting the presumption of fault in the management of that boat. The first is, that there was no sufficient lookout or watch on her deck prior to and at the time of the collision; and second, that the pilot was not competent or trustworthy.

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As to the first point stated, there is no controversy as to the facts. It appears clearly from the evidence, that from the time the boats came in sight until after the collision, there was no one on the deck of the Goody Friends, except Harrison, the pilot, and Logan, and they were both in the pilot-house. Although the night was very dark, and the signals had given notice that a boat was approaching, the master was in his berth, and was only roused from his slumbers by the crash of the collision. The mate, whose watch it was, had deserted his post on deck, and was below warming himself at the stove, apparently giving no attention whatever to the navigation of the boat. Now, it has been several times ruled by the Supreme Court, and recognized by this court as law in collision cases, that it is not enough that there is a pilot in the wheel-house, but there must be some one on deck charged with the special duty of keeping a vigilant lookout, and that his proper position is not in the wheel-house, but on the forward part of the deck where the best opportunity is offered for observing approaching and passing boats, and who will be able to communicate promptly to the pilot such information as he may need to insure the safety of his boat. The cases sustaining this rule have been so often cited by this court as to render a special reference to them altogether unnecessary. The importance and pertinency of the rule, as applicable to the case before the court, will be apparent from the fact stated by Harrison and Logan as the only reason for not having sooner given the order to back, that in the wheel-house the view of the South Bend was temporarily intercepted by one of the chimneys of the Goody Friends, so that they were unable to determine the exact course of the former boat. While it is most probable this fact is stated as a mere excuse for the delay which occurred in giving the order to back, it is obvious that if such a difficulty had any existence in fact, it would have been obviated by the vigilance of a faithful lookout stationed on the forward part of the deck.

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In regard to the incompetency of the pilot Harrison, there are some pertinent facts in evidence. It is in proof that he has a good deal of experience and knowledge as a pilot, and in former years was regarded as entirely competent and trustworthy in his profession; but for several years past his habits have been those of a very intemperate man, and as a result of his habits he has not been able to find regular employment as a pilot. This fact, of itself, casts suspicion on his competency and trustworthiness. In addition to this, it is proved that he was in a state of great excitement when he went aboard of the Goody Friends at Memphis, in the evening of the 12th of December, and was then, as some of the witnesses thought, in a state of intoxication. It is also proved that he was continuously on duty as pilot from the time the boat left Memphis, between seven and eight o'clock in the morning, until the occurrence of the collision the next morning, between five and six o'clock, with the exception of some seven or eight miles, during the running of which Logan had charge of the wheel, but Harrison stood by his side in the wheel-house. It is also proved by a witness, who was master of a boat which passed the Goody Friends during the night, that his attention was drawn to her by the wildness and unsteadiness of her movements.

It may be proper to remark, that the facts that there was no sufficient lookout on the Goody Friends, and the doubtful competency and trustworthiness of the pilot, are not referred to as conclusive evidence that the fault of this collision is to be charged to that boat. They would not be sufficient to repel or overcome clear evidence that the collision was due solely to the mismanagement of the other boat. But, in the light of the authorities referred to, they justify a *prima facie* presumption of fault, and make it incumbent on the party against whom this presumption arises, to repel it by clear proof that the fault was on the other side.

As already intimated, the facts in this case prove with reasonable certainty that there were faults in the manage-

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ment of both of these boats, and that it is a proper case for the division of the damages which resulted from the collision. The specific acts of unskillfulness and negligence fairly chargeable to each, may be briefly stated as follows:

The pilot of the South Bend was in fault: *first*, in crossing toward the bar on the Arkansas side, and attempting to descend at or near the place of an ascending boat, in violation of the signals which had been given, and of the usages of navigation applicable to that part of the river; *second*, if he misapprehended the signals and supposed them to have been different from what the evidence shows they were, he was in fault in not having sooner ascertained his mistake, and in not stopping his boat at once, and calling for a repetition of the signals to ascertain what was desired and intended by the ascending boat.

The pilot of the Goody Friends was also in fault: *first*, in not exercising a proper vigilance in correcting the apparent misapprehension in regard to the signals, by stopping his boat in time and repeating his signals until there should be right understanding between the boats; *second*, in continuing under full headway until the boats were so near that a collision was inevitable, and neglecting to give the order to back until from the close proximity of the boats it was impossible to execute it; *third*, it is clear from the evidence, that there was no one on the deck of the Goody Friends for some time prior to, and at the time of the collision, charged with the special duty of keeping a vigilant lookout, and giving the pilot timely information of any obstruction, difficulty, or danger in the navigation of his boat.

A decree will therefore be entered on the basis of mutual fault. But as it appears there was some injury sustained by the Goody Friends, and also some detention resulting from the collision, in relation to which I am not aware that there is any evidence before the court, the court will either now hear the evidence, or refer it to a commissioner to ascertain the injury suffered by that boat. If, however,

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the counsel can agree upon the amount, it will supersede the necessity of either course. This amount will be deducted from the loss sustained by the libellants, and a decree will be entered against the Goody Friends for one-half of the balance, with interest from the date of the collision.

(DISTRICT COURT.)

CHARLES H. COLLINS ET AL. v. STEAMBOAT FORT WAYNE.

A salvage service, in raising and preserving a steamboat sunk in the Mississippi river, has a priority of lien over claims for wages earned and supplies furnished before the accident.

A salvor is favored in law, on the assumption that without his service the *res* might have been wholly lost.

If the salvage service is rendered under a previous special agreement, fairly made, stipulating for a compensation contingent on the success of the salvor's efforts, it will be recognized in admiralty as creating a valid lien.

But if there are prior lien-holders, not parties to such agreement, they are not concluded as to the amount of compensation agreed to be paid, and a court of admiralty may inquire into the reasonableness of the compensation, and make such allowance as may be equitable.

The lien of seamen for wages earned prior to the accident is not absolutely extinguished thereby, but continues subject to the salvor's lien.

The salvage agreement having stipulated for a compensation of twenty-five per cent. on the value of the boat, assumed in the policy of insurance at \$18,000, and it appearing that the actual value did not exceed \$9,000, the sum claimed for salvage is unreasonable, under the circumstances of the case, and subject to reduction by the court.

An insurance company having paid their quota for the salvage service, and having made advances for the necessary repairs of the boat after being raised, the owners having no means or credit by which to make the repairs, have a maritime lien at least to the extent of such repairs.

A due-bill given by the master in the name of the owners for the amount of such repairs, reciting that they were necessary, and that the advances therefor were on the credit of the boat, is conclusive on the owners, unless impeached for fraud, and constitutes a valid lien.

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Claims for wages earned after the boat was repaired, have an equality of lien with that for advances made for repairs.

The Fort Wayne having been enrolled at Cincinnati as of that place, and two of the owners residing in the State of Ohio, one of whom was the managing owner, the boat was properly enrolled there, and that was the home port of the boat, although a majority of the owners resided in the State of Pennsylvania, and claimants, therefore, for stores and supplies furnished at Cincinnati have no lien on the boat therefor.

Debts incurred in building a boat are presumed to be based on the personal credit of the owners, and do not import a maritime lien. And this doctrine is not affected by the fact that such debts are declared to be a lien by the law of the State in which the boat was built.

Lincoln, Smith & Warnock, for libellants.

Dodd & Huston, for respondents.

OPINION OF THE COURT:

The *status* of this case, with the numerous and somewhat complicated questions involved, will be sufficiently intelligible from the following brief statement. On April 16, 1861, at the instance of Charles H. Collins, the libellant, the steamboat Fort Wayne, was arrested at the port of Cincinnati by process from this court. The claim of Collins, as set forth in his libel, is for stores and supplies furnished on the credit of the boat at Pittsburg, in the State of Pennsylvania, from June 20, 1859, to January 28, 1861. Subsequently to the seizure of the boat, numerous interveners have filed claims, which, without reference to any question of the priorities of their liens, may be classified under the following heads: 1. Wages earned before the sinking and repair of the boat; 2. Wages earned subsequently; 3. Stores and supplies furnished at Pittsburg, Cincinnati, Cairo, and St. Louis, both before and after the boat was sunk; 4. Lighterage, and the hire of a tow-boat at Louisville; 5. Building debts incurred at Pittsburg; 6. Salvage service by the Missouri Wrecking Company in raising the boat; 7. Repairs by the Eureka Insurance Company after the boat was raised.

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By an interlocutory decree of this court, entered April 23, 1861, the boat was sold at public sale by the marshal, at Cincinnati, for \$3,650, which sum has been paid into the registry, subject to the order of the court for its distribution. And by agreement of the proctors of the parties, the claims for wages accruing after the boat was raised, repaired, and fitted for navigation, have been paid. There yet remains in the registry about \$2,500, for distribution to the claimants as their rights and priorities may be determined by the court.

The first claim to be considered will be that of the Missouri Wrecking Company. And one of the questions involved in it is, whether it has a priority of lien over claims arising prior to the salvage service rendered by that company. In their libel, they allege, in substance, that on February 20, 1861, the Fort Wayne, in a trip from New Orleans to Cincinnati and Pittsburg with a large cargo, struck a log in the Mississippi river, near the foot of Island No. 16, and was so injured thereby as to sink and become a total wreck; that the owners and underwriters, being unable to save the boat or cargo, requested the Missouri Wrecking Company to take possession of the wreck and the cargo as salvors, and, if practicable, to save the same, agreeing to pay the company twenty-five per cent. on the value of the boat, estimated in the policy of insurance at \$18,000; that the company, by its agents, immediately repaired to the wreck with their boats and machinery, and began their operations the 24th of February, and on the 6th of March had succeeded in raising the boat and a good part of the cargo, and on the 18th of March delivered the boat at Mound City, near Cairo, for repairs.

The libel of the wrecking company also alleges that the company is a corporation with a large capital invested in boats and machinery for saving wrecked boats and their cargoes; prepared, equipped, and manned for such service, and of little value for any other purpose; and that the Fort Wayne could not have been raised or saved by any

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other agency. It is also averred that the charge of the company is reasonable, and in accordance with their usage, and that there is now due them for their services the sum of \$1,500, for which they ask a decree.

Without reciting the evidence proving the salvage service rendered by the wrecking company, it will be sufficient to say that it fully sustains all the material allegations of their libel. It is proved that one of the boats of the company, called the Submarine No. 7, fitted out with powerful pumps, diving-bells, and all other necessary appliances, with a full complement of officers and hands, repaired to the wreck of the Fort Wayne, upon the application of Capt. Barr, the master of that boat, and that a contract for raising the wreck, and saving the cargo, was signed by him in behalf of the owners and insurers, by which the company, if successful, were to be paid twenty-five per cent. on the value of the boat as estimated in the policy of insurance. It is also clearly proved that from the situation of the wreck there was danger of its immediate destruction, and the consequent loss of the entire cargo. The deck of the boat was badly twisted and strained, and there was a large hole or opening in its side; and as the current was swift, and the river rapidly rising at the time, the witnesses agree in saying the boat would have gone to pieces in a short time, and, with the cargo, would have been a total loss. It is also proved that the company were occupied in the service from the 24th of February until the 6th of March, and that the actual expense of raising the boat, and delivering it, with the cargo, at Mound City, was not less than \$2,000. It also appears that the value of the cargo saved, from actual sale, was \$6,761, and that by the contract the company were to receive thirty per cent. on the value, making \$2,028, which, with the twenty-five per cent. on the estimated value of the boat—\$18,000—made an aggregate for salvage service of \$6,528. Of the \$4,500 claimed by the company for raising the boat and taking it to Mound

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City, they admit the payment of \$3,000, leaving a balance now claimed as unpaid of \$1,500.

These are all the material facts connected with the alleged salvage service which it is necessary to notice. On these facts, it is insisted by the proctor, who resists the allowance of this claim: 1. That this is not a salvage service, and that the wrecking company are not salvors in the sense of having a priority of lien, for the reason that the service was rendered under a special agreement between the parties; 2. That if there was a meritorious salvage service, the sum claimed is unreasonably large, and that the equity of the case requires its reduction.

It may be remarked here that it does not admit of doubt, nor is it controverted in this case, that if there has been a salvage service rendered by the wrecking company within the meaning of the maritime law, it imports a lien in their favor which has priority over claims for wages earned, or supplies furnished, before the sinking of the boat. This is well-established law, and has its basis in obvious principles of justice and reason. Meritorious salvors stand in the front rank of privilege, and the rights of those having liens before the salvage service must be secondary to those having a salvage claim. This principle is well stated in Coote's Admiralty Practice. The author says, page 116: "The suitor in salvage is highly favored in law, on the assumption that, without his assistance, the *res* might have been wholly lost. The service is, therefore, beneficial to all parties having either an interest in, or a claim to, the ship and her freight and cargo." And again, page 117, it is laid down, that "salvage is privileged before the original or prior wages of the ship's crew, on the ground that they are saved to them as much as, or *eadem ratione qua*, the ship is saved to their owners." This doctrine is so well settled, both by the English and American authorities, that it is useless to multiply citations.

I proceed, therefore, to notice the question whether there can be a salvor's lien or a salvor's compensation, if the

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service has been rendered under a special contract. There would seem to be no doubt on this point, but as it has been controverted in the argument, I will refer to some of the authorities bearing upon it. These clearly settle the doctrine, that it is not less a salvage service, if performed under an agreement to pay and accept a stipulated sum, if the service is successful. In Flanders on Maritime Law, page 331, it is said: "Where there has been a definite, distinct agreement, with ample time for the parties to consider what they are doing, and no advantage has been taken of the circumstances of distress in which one party is placed, such an agreement, so entered into, a court of admiralty will not disturb." And in Conkling's U. S. Admiralty, vol. 1, page 351, the author says: "Neither is it important whether the service was rendered spontaneously or by request; or, whether in a case of a previous contract, the rate or amount of compensation for the labor and services to be performed was agreed upon, or left to be determined by the *quantum meruerunt*. The service, whether rendered spontaneously or by request, is a salvage service, and the contract, if there is one, is a salvage contract, and the compensation a salvage compensation."

In the case of the *Emulous*, 1 Sumner, 207, Judge Story says on this subject: "I take it to be very clear that when the service has been rendered under circumstances which establish that the parties have voluntarily, and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services *quantum meruerunt*, in either case it does not alter the nature of the service as a salvage service, but only fixes the rule by which the court is to be governed. It is still a salvage service and a salvage compensation."

The same doctrine is distinctly asserted in the case of the *Independence*, 2 Curtis, 350, in which the learned judge says: "I do not intend to be understood, however, that a

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case, in which a contract exists, may not also be a case of salvage. The parties may agree on the amount of a salvage compensation, or on the principles on which it shall be adjusted; and such agreement fairly made, no advantage being taken of ignorance or distress, are readily upheld by courts." The exception to this rule, stated by the learned judge in the same case, is what it is stipulated in the contract, that the party rendering the service shall receive a fixed sum, whether the property is lost or saved. Such a contract will not be recognized by a court of admiralty as importing a maritime salvage service.

And in the case of *The True Blue*, 9 Eng. Ad. 177, the court state the law on this subject as follows: "Now, I entertain no doubt whatever that an agreement of this description can be legally made between the master of a vessel in distress and persons affording salvage assistance: provided, there be a clear understanding of the nature of the agreement; that it is made with fairness and impartiality to all concerned; and that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves. Such an agreement, I feel no hesitation to pronounce, would be a binding instrument, not to be disturbed by the judgment of this court."

Without referring to other authorities on this point, it seems to be well-settled law that a special agreement for a salvage service, under the conditions above stated, will be regarded as valid in a court of maritime jurisdiction. But it is still a question arising from the posture of this case, whether other persons not parties to the agreement, but parties in interest, are concluded by it in respect of the sum agreed on as the compensation for the salvage service. The agreement is signed by the master of the Fort Wayne for the owners and underwriters, and by the wrecking company. So far as their interests are concerned, in the absence of circumstances invalidating the entire agreement, the court might well hesitate to interfere with the amount of compensation stipulated to be paid. But there are sea-

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men, not parties to that agreement, who have claims for wages earned prior to the accident to the boat; and as to these, equity requires they should not be placed in a worse condition than they would be if the salvage service had been spontaneous and not by special agreement. It is the obvious duty of the court to protect their interests as far as it may be practicable. They had an unquestioned superior lien for their wages prior to the sinking of the boat; and their lien, though suspended by that accident, revived and attached after the boat was raised and repaired, subject to the lien of the salvors, and those who made the advances for repairs. In other words, if the claims for salvage and repairs were less than the fair value of the boat after being raised and repaired, the prior lien-holder would have a legal claim to the extent of such difference. Now, the evidence is that in February, 1861, when this accident occurred, the Fort Wayne was worth from \$8,000 to \$9,000, and that after being raised and repaired, even in the depressed condition of the steamboat business at that time, it would have sold at Cairo for about \$6,000. This statement shows conclusively, that allowing a fair compensation for the salvage service and the repairs, there was something to which the prior lien for wages could attach.

The argument urged against this view is, that when the Fort Wayne rested as a mere wreck on the bottom of the Mississippi, it was wholly valueless, and could not therefore be the subject of a lien. True, the admitted doctrine of the maritime law is, that *freight is the mother of wages*; and where there has been a total destruction of a vessel, there is no *res* to which the seaman's lien can attach, and there can therefore be no proceeding *in rem*. But it is equally well settled, that if any part of the vessel is saved, this lien adheres to it, even to the last plank. And, if the wreck is restored and rendered valuable, the lien exists, subject to the superior lien of those by whose labor or money the value has been created. The following are some of the authorities which affirm this principle: 1 Hagg.

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Ad. 227; 9 Eng. Ad. 120; 7 Law Rep. 522; 1 Newberry Ad. 195; 2 Parsons' Mar. Law, 591; 2 Conkling's Ad. 105, 106.

I can not hesitate in the conclusion, that the accident by which the Fort Wayne was sunk, affected only *sub modo* the rights of those having prior liens, not being parties to the salvage agreement. So far as this agreement assumes a valuation of the boat, and fixes a rate of compensation based on such valuation, the court may inquire whether from the facts in proof, the compensation for the salvage service is fair and equitable.

In this inquiry, I have no desire to deprive these salvors of a liberal reward for their labors in the rescue and preservation of this property. Meritorious suitors in salvage have a favorable standing in maritime courts, and it certainly has not been the error of those courts that their allowances for salvage services have been meted out with a stinted or niggardly hand. And it must be conceded, there are features in the service rendered by the wrecking company calling for a liberal allowance. It is worthy of remark, however, that the liberal spirit which has actuated judges and courts in their action on salvage claims had its origin in cases connected with the commerce and navigation of the ocean, which generally involves severe toil and exposure and great peril of life. Where these elements of the service are apparent, the great interests of commerce and a laudable appreciation of heroic actions often demand a rate of compensation bearing no proportion to the time occupied or the labor performed in the service.

But in this case, these features of a salvage service do not appear. The service was performed on the Mississippi river, and did not involve the usual hazards of a service on the ocean. Yet it was effective and valuable, and in some of its aspects justifies a liberal allowance to the salvors. The Missouri Wrecking Company has been incorporated by an act of the legislature of Missouri. Their object is to save boats and other property in peril on the Ohio and

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Mississippi rivers for compensation. The company have a capital of \$200,000, and have provided at a heavy expenditure of money the necessary boats and machinery for the prompt and effective prosecution of their business. It has been in existence some years, and has had a virtual monopoly of the wrecking business since it has been in being. Though the main object of the stockholders doubtless is their pecuniary profit, their operations have been greatly beneficial to the commerce of the West. Their expensive boats and machinery are admirably adapted to rescue property from loss and destruction; and in many cases they have been successful where all other agencies would fail. In the case of the Fort Wayne, the evidence makes it certain that the boat and cargo would have been a total loss but for the means used for their rescue. Ten days of arduous labor, involving doubtless some hardships and some peril of life, were occupied in raising the boat and securing the cargo. There was an actual outlay in the performance of the service of not less than \$2,000. Added to this, it may be noticed that the compensation was contingent on the success of their efforts to save the property.

But giving due weight to these facts, I can not resist the conviction, that as between those having prior liens and the wrecking company, the amount claimed and due by the strict terms of the agreement exceeds a just remuneration for the service. The agreement, as before stated, assures to the company twenty-five per cent. on the valuation of the boat, which is assumed in the policy of insurance at \$18,000, and thirty per cent. on the value of the cargo, ascertained by actual sale to have been \$6,761. The result will appear from the following statement:

25 per cent. on \$18,000 is	-	-	-	\$4,500
30 per cent. on \$6,761,	-	-	-	2,028
				<hr/>
Making an aggregate of	-	-	-	\$6,528

This sum is unreasonably large for the service rendered. That its allowance is inequitable will clearly appear from

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the fact that the result produced by the literal terms of the agreement, is based on a false and fictitious value of the Fort Wayne. The agreement assumes the value of the boat to be \$18,000, whereas the weight of testimony proves clearly that its actual value at the time of the accident did not exceed \$8,000 or \$9,000, and that when raised and repaired, the boat at Cairo would probably have sold for about \$6,000. It thus appears that \$4,500, claimed for salvage on the boat, is one-half of its highest estimated value, in ordinary times, and more than two-thirds the amount for which it would have sold after being raised and repaired. If to this is added upward of \$2,000, paid to the wrecking company for saving the cargo, it will be obvious that their claim for their service is greatly too large. And justice to the prior lien-holders will not sanction the allowance of the whole claim of \$4,500 as salvage in raising the boat. Of this sum, it seems \$3,000 have been paid by the underwriters, leaving a balance as claimed of \$1,500. I might, perhaps, be fully justified in refusing to allow any part of this balance, but desiring to act in a spirit of great liberality, I will reduce the sum claimed one thousand dollars only, and render a decree in favor of the wrecking company for \$500.

The next claim is that of the Eureka Insurance Company of Pittsburg, in the State of Pennsylvania, for \$1,500. This claim is for money advanced for repairs to the Fort Wayne after being raised and taken to Mound City. The libel of the insurance company sets forth, in substance, that these repairs were indispensable, and without them the boat was useless; that the owners had no means to make them, and no credit on which they could have procured them to be made; that they advanced the money, not on the credit of the owners, but on the credit of the boat; and that the master gave a due-bill for the amount, expressly stating that they were made on the credit of the boat. The libellants claim that they have a lien on the boat for this money, and ask for a decree for the amount.

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The due-bill given for the repairs is one of the exhibits in the case. It bears date at Cairo, April 11, 1861, and recites that the \$1,500, for which it was given, was "*for money advanced for repairs to the boat after being raised; the same being necessary to enable her to reach Cincinnati, and advanced on the credit of the boat.*" It is signed, "*Steamboat Fort Wayne and owners, by Samuel Barr, Jr., Master.*"

It is insisted that this due-bill imports a lien on the boat, having priority next to that of the Missouri Wrecking Company, as a claim for repairs in the nature of salvage repairs, indispensable to the further service of the boat, made expressly on its credit in a State other than that in which its home port is situated. This is controverted on the ground: 1. That the funds were advanced and the repairs made without the assent of the owners, who are not, therefore, concluded by the due-bill signed by the master, and that the same does not create a maritime lien on the boat; 2. That the advances for repairs by the Eureka company were made for their benefit, and in discharge of their liability to the owners as insurers of the steamboat.

I do not propose to examine at length the first point. I suppose the proposition is incontrovertible, that he who lends or advances money at a port or place in a State, to which the boat or vessel does not belong, for repairs necessary to the successful prosecution of its business, has a lien, for the enforcement of which he may proceed *in rem*. A very respectable elementary writer says: "A person who lends money to be employed in the repairs of a vessel, or to furnish her with supplies, has the same privilege against the vessel and freight that material-men have. He is considered as giving credit both to the ship and to the owners. The ship is hypothecated to him for his security, and he may maintain in the admiralty, either a libel *in rem*. against the vessel and freight, or *in personam* against the owner." Flanders' Mar. Law, sec. 239. The same doctrine is distinctly asserted in the case of *Davis v. Childs*, Davies, 71; and

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by other American cases, to which it is not necessary specially to refer.

The due-bill given by the master, which has been already noticed, contains all the facts necessary to clothe this claim with the requisites of a maritime lien. It states explicitly that the repairs were not only necessary, but that the advances made for that purpose were made on the credit of the boat. *Prima facie*, the boat was bound for these advances. The due-bill may be impeached for fraud, but there is nothing in the evidence from which the inference of fraud can be deduced. If the oral evidence of the master were admissible to contradict the facts stated in the due-bill, it would not establish such a conclusion. On the contrary, all the proofs in the case sustain the fairness and validity of the due-bill. The Fort Wayne was so seriously crippled and injured, that it was with difficulty the boat could be taken to Mound City, the nearest point at which the repairs could be made. It would have been hazardous, if not impracticable, to have taken the boat to Cincinnati for that purpose. The interests of all parties required that the repairs should be made without delay. The owners resided in a distant city, and had neither means nor credit to make the repairs at Mound City. They were represented by the master, who made no objection to the repairs being made by the Insurance Company, but was present a portion of the time they were in progress, and gave directions as to the manner in which they should be made. Moreover, upon their completion, he took possession of the boat, for the owners, and gave the due-bill as their agent for the amount expended. This was clearly a legal assent by the owners to the making of the repairs.

It is also worthy of remark, that the insurers of the boat had expressly reserved in the policy, in case of accident to the boat, and the neglect of the owners to have the necessary repairs promptly made, the right to make them "on account of the assured." That they were made judiciously, and with due regard to economy, clearly appears from the

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evidence. It is also distinctly proved, that after the repairs were made, the boat was delivered to the master with the express understanding that it was bound for the amount expended, and that it would not have been put within the control of the master on any other condition. And it is also proved, that this was in strict accordance with a general usage on the western rivers.

I will now briefly notice the other objection to the claim of the insurance company, namely, that the advances for repairs were made for their benefit, and in discharge of their liability as insurers of the boat. This objection, if sustained by the evidence, must be fatal to this claim. But the facts, so far as they are developed in this case, negative the conclusion insisted on. The due-bill given by the master, on the settlement for the repairs, with the recitals which have been noticed, is a full answer to this objection. It is a distinct acknowledgment of the indebtedness of the owners to the insurance company, in the amount advanced for the repairs, without any reference to any liability of the company on their policy. The libel also, sworn to by the secretary of the company, and not contradicted by the evidence, distinctly alleges that the advances for repairs were justly due by the owners of the boat.

As a further and conclusive answer to the objection urged to this claim, it should be stated that from the facts before the court it appears the insurance company had previously paid the wrecking company their full proportion of the claim for raising the boat, exclusive of the amount paid for repairs.

It is possible that all the facts connected with these transactions are not before the court. I can only adjudicate on such facts as are in evidence in the case. From these it appears that the Eureka Insurance Company had a risk of \$5,000 in the boat; and that the whole amount of insurance in that and other companies was \$12,000; the assumed value of the boat being \$18,000. By the terms of the policies the insurers reserved the right to repair the boat in

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case of accident or damage, and they were liable to the owners in the proportion that \$12,000 bears to \$18,000. The charge of the wrecking company, as already stated, was \$4,500; and upon an adjustment made on that basis, the sum for which the insurers were liable was \$3,000. The president of the wrecking company testifies that this amount was paid by the insurance companies, and was in full discharge of their liability for raising the boat.

I can have no hesitation, therefore, in holding that the claim of the Eureka Insurance Company is established by the evidence, and is a lien on the boat, ranking in privilege next to the salvage claim of the Missouri Wrecking Company. This lien rests on the footing of money loaned or advanced for repairs to the boat, without which it would have been of little value, and could not possibly have prosecuted its business. The money so advanced and applied may be supposed, therefore, to have inured to the benefit of prior lien-holders. And according to the doctrine distinctly asserted by Dr. Lushington, in the case of the *Aline*, 1 W. Rob. 119, 120, the persons making such advances have a priority, to the extent of the repairs made, over all other lien-holders. But the case before me does not call for a more extended exposition of this principle.

The remaining questions arising in the case will now be disposed of. And here, I may remark, there is no controversy as to the claims for wages, and of material-men, accruing after the boat was raised and repaired. These claims are satisfactorily proved, and will have the same rank of privilege, in the distribution of the fund in the registry, as the claim of the Eureka Insurance Company.

The claims thus having a priority of lien being satisfied, there will be still a remnant in the registry to be apportioned to other claimants. Of these, the claims for wages earned before the accident to the boat will stand next in the order of privilege, and will be paid in full, if the fund is sufficient for that purpose. If not, there will be a *pro rata* application of the balance of the fund.

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If, after satisfying the liens in the order stated, there should be a balance in the registry, it will be applied *pro rata* to the material-men, whose claims import a maritime lien. In this class are included the claims for stores, supplies, etc., furnished at St. Louis, Cairo, Louisville, and Pittsburg. The Fort Wayne being a foreign boat as to these places, the claimants have an undoubted maritime lien. But claims originating at Cincinnati, being the home port of the boat, do not imply a lien, and must be rejected. The Proctor, representing these claims, strenuously insists that Cincinnati is not the home port of the boat, and that the claimants therefore have a lien. It is true a majority of the owners resided at Pittsburg, but the owners of six-sixteenths were residents of the State of Ohio, one of whom was the *managing owner*. The boat was enrolled at Cincinnati as of that place; and this affords, *prima facie*, the presumption that this was its home port. This presumption may be rebutted by evidence that all the owners notoriously resided elsewhere. But the evidence establishes the fact, that a part of the owners, including the managing owner, resided in Ohio. The act of Congress requires the enrollment to be made in the district "at or nearest" to which the owners or ship's husband usually resides. The managing owner, in the case of western steamboats, answers substantially to the ship's husband as used in the act of Congress; and, as in this case, his residence was at Cincinnati, the enrollment of the Fort Wayne was properly made there, and that must be regarded as the home port. 1 Newberry's Ad. 176; 1 Parsons' on Mar. Law 32, *et seq.*

The only remaining claim is that of Fulton & Son, being an original bill for building the Fort Wayne, at Pittsburg. As it is very clear that the fund in the registry will be exhausted in payment of the claims which have priority over this, it can be of no importance to these claimants, whether theirs is allowed or rejected. It may be proper to state, however, that it is now the established law in this country

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that building debts do not constitute a maritime lien. In the case of the *People's Ferry Company of Boston v. Beers et al.*, 20 Howard, 898, the Supreme Court of the United States decide, that "the admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel for work done and materials found in its construction." The ruling of that court is decisive of the claim in question. It proceeds on the theory that building debts are contracted on the personal credit of the owner, and do not, therefore, create a maritime lien. This result is not affected by the fact that these debts are declared to be liens by a statute of the State of Pennsylvania, within which State the Fort Wayne was built. Conceding it to be within the jurisdiction of the admiralty courts of the Union to enforce local liens under State laws, it is clear that State legislation can not supersede or displace liens existing under the general maritime law.

A decree may be drawn providing for the application of the fund in the registry in the order of priority, and on the principles indicated by the court.

(CIRCUIT COURT.)

**DUNHAM AND ST. JOHN v. THE EATON AND HAMILTON RAILROAD
COMPANY ET AL.**

The complainant in a bill in equity is not required to set out all the minute facts of his case; the general statement of a precise fact is usually sufficient.

Where a bill in equity distinctly alleges that the defendants subscribed stock for the express purpose of constructing a branch railroad called the Eaton and Piqua Branch, and are liable in equity to account to the complainants therefor, such statement embraces facts which constitute the right of complainants to enforce the claim asserted by them, and

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it is not necessary for the defense that the bill should state all the particulars of the subscriptions, including the amount subscribed and due by each one.

Where a receiver has proceeded, under a decree in favor of complainants, to reduce into his possession the property or assets of the defendants, the complainants can not call on the defendants for a disclosure by means of a supplemental bill.

M. H. Tilden, for plaintiffs.

Wm. B. Caldwell, for defendants.

OPINION OF THE COURT :

The question before the court arises on a demurrer to the supplemental bill filed by the complainants, the object of which is to carry into effect the decree of this court based on the original bill. The objection mainly relied on, and urged in argument in support of the demurrer, is the alleged uncertainty in the statement of the nature and extent of the liability and indebtedness of the defendants, and the want of any sufficient reason or excuse for such uncertainty.

The supplemental bill recites the material averments in the original bill, to which the Louisville and Sandusky Railroad Company and the Eaton and Hamilton Railroad Company were the only defendants. These recitals are, in substance, that the last-named company, being about to construct a railroad from the town of Piqua to the town of Eaton, in the State of Ohio, obtained from divers persons, averred to be unknown to the complainants, by way of subscriptions for the construction of the branch road from Piqua to Eaton, certain moneys, bonds, bills, notes, and securities; that the complainants with another person, who has since assigned his interest in the contract, on September 15, 1853, entered into a written contract with the Eaton and Hamilton Railroad Company, by which they agreed to construct the railroad from Piqua to Eaton, at prices stipulated between the parties, and by which it was expressly agreed that the complainants were to be paid

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exclusively and only out of the subscriptions for the construction of said branch road; that some time after the complainants had entered upon the execution of said contract, the Eaton and Hamilton Railroad Company assigned the branch road from Piqua to Eaton, and the said contract, together with the subscriptions and all funds procured for the special purpose of constructing said branch road, to the Louisville and Sandusky Railroad Company; that company agreeing to construct the branch road, and to comply with the contract made with the complainants, and to apply the subscriptions and funds specially obtained for the construction of the branch road, to that object; that the complainants continued in the execution of said contract until September, 1854, when they were required by said Louisville and Sandusky Railroad Company to suspend operations; and that when they so suspended, there was a large amount due them for work done, and materials furnished, in the construction of the road; that the Louisville and Sandusky Railroad Company suspended all business operations and wholly failed to collect and apply the special subscriptions for the construction of the branch road to the payment of the complainants.

The supplemental bill further avers, that by the original bill it was claimed that the complainants had a specific lien on the subscriptions and funds raised for the purpose of constructing the road from Piqua to Eaton, and were entitled in equity to enforce payment from the persons who had become subscribers of stock for that specific purpose; and the bill prayed an account of such subscriptions and a discovery of the names of those who had thus subscribed and were liable therefor.

The supplemental bill further avers that at the April term of this court, in the year 1858, a decree was entered in the original case against the Louisville and Sandusky Railroad Company, in favor of the complainants, for \$12,181, as the sum due them for work done under their contract in the construction of the Piqua and Eaton road; and that it was

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held and adjudged by said decree that the complainants had a specific claim to, or lien upon, the stock subscriptions made for the purpose of constructing said branch road. And by said decree it was further provided that the case should be referred to a master to ascertain and report the property and effects of the Louisville and Sandusky Railroad Company, which, when ascertained, were to be delivered to a receiver, then appointed by the court. It is then averred that the supplemental bill is filed to obtain "the aid and assistance of this court to carry said decree into execution;" and also, "that the following-named persons became and are subscribers to the capital stock of said Eaton and Hamilton, and to the stock of said Louisville and Sandusky Railroad Company, and that they subscribed their said stock for the special purpose of having the same applied to the construction of said line of road from Eaton to Piqua." Then follows the names of these persons, numbering several hundred, averred to be subscribers or stockholders for the construction of the last-named road, and as to whom the prayer of the bill is, that they may be made defendants thereto, and may be required to answer; and that an account may be taken of the sum due from them respectively, and that they may be adjudged to pay the same to the complainants.

By an amendment to the supplemental bill, it is averred "that each and every one of the said defendants named is indebted on account of their said subscriptions to said stock therein set forth, subscribed for the special purpose of constructing such branch road, and made to said Eaton and Hamilton Railroad, but the complainants do not know, and are unable to state, the several amounts due from them, or any or either of them, and they pray that each and every of them may be compelled to state and set forth by answer on oath the amount respectively subscribed and paid by them, and when and how the same was paid, and when and how the same was subscribed, and that it be referred to the master to inquire and report how much remains due from each and every of them," etc.,

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This reference to the recitals and allegations of the supplemental bill seems necessary to a right understanding of the question presented on this demurrer. It will be seen that it is simply a question of pleading, and its decision either way will not affect the merits of this controversy. The demurrer admits all the facts alleged in the bill, and presents the single inquiry, whether those facts, as set forth, are sufficient to fix liability on these defendants. All inquiry into the regularity and validity of the original decree is precluded, in the present posture of the case. The decree is conclusive on them, though not parties to the original bill, so far as it establishes the equity of the claim of these complainants, as set up in that bill. It finds the fact that under their contract with the Eaton and Hamilton Railroad Company, the complainants performed labor in the construction of the Piqua and Eaton Branch, to the amount of \$12,181, which is now justly due them; and also that they have a specific lien on the subscriptions of stock, made expressly for that object, which ought in equity to be enforced. But this decree can be of no avail to the complainants, until it is ascertained who are the subscribers to that stock, and the amount due from each. To effect this object the supplemental bill is filed, setting out the names of those subscribers as far as known, and asking the aid of this court in carrying into effect the original decree. And it prays that these demurring defendants may be required to disclose on oath to which of the companies their subscriptions, were made, the amount of such subscription, and the sum due from each, on account of such subscription. These are matters which these defendants have an undoubted right to litigate, and which they could put in issue by their answers. They have, however, declined to answer, and by their demurrer present the question to the court, whether the allegations of the bill are so made as that they can be required to answer.

In support of the demurrer, it is insisted, in the first place, that the bill is defective in not stating with any cer-

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tainty, whether the stock subscriptions of the defendants were made to the Eaton and Hamilton, or the Louisville and Sandusky Railroad Company, and also in not setting out the sum subscribed by each, and the amount of the indebtedness of each, and the amount now claimed as due from each. And it is also insisted that the bill alleges no sufficient excuse for the vagueness and uncertainty of its averments as to these facts.

As to these subscriptions, it is expressly averred, in the supplemental bill, that these defendants "became and are subscribers to the capital stock of said Eaton and Hamilton Railroad Company, and to the stock of said Louisville and Sandusky Railroad Company," and that "they subscribed their said stock for the special purpose of having the same applied to the construction of said line of road from Eaton to Piqua." The bill further avers, that the said "defendants are indebted on account of said subscriptions, but the complainants do not know and are unable to state the amounts due from them, or either of them," and they pray for an account and discovery, etc.

Are these allegations sufficiently certain to put the defendants on their answer? There can be no question that some degree of strictness is required in chancery pleadings, as well as those at law. Judge Story says on this subject: "It may, perhaps, be correctly affirmed, that certainty to a common intent is the most that the rules of equity ordinarily require in pleadings for any purpose." Com. on Eq. Plea. 206. In the same work, after stating that the bill should set forth the right and title of the plaintiff, together with the grievance of which he complains, and the relief which he seeks, with accuracy and clearness, he adds, "the other *material* facts ought to be plainly, yet succinctly alleged, with all necessary and convenient certainty, as to essential circumstances of time, place, manner, and other incidents." Ibid. 206, 207. Another writer on equity pleadings says, "the plaintiff in his bill is not required to set out all the minute facts of his case." The general state-

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ment of a precise fact is usually sufficient, and the circumstances which go to establish it, need not be minutely charged; for they more properly constitute matters of evidence than of allegation; and "general terms are sufficient when the subject comprehends a multiplicity of matter and when the particulars are more fully known to the opposite party." Wellford on Eq. Plea. 6, 88.

It would seem that this bill contains all the allegations of material facts required by these rules. The fact is distinctly alleged, that these defendants subscribed stock to the Eaton and Hamilton and the Louisville and Sandusky roads for the express purpose of constructing the Eaton and Piqua Branch, and are liable in equity to account to the complainants therefor. These are the material facts which constitute the right of the complainants to enforce the claim asserted by them. The ground of that claim is, that the defendants by reason of these subscriptions subjected themselves to liability, and that such liability now exists in favor of the complainants. And surely it can not be necessary to their defense that the bill should state all the particulars of these subscriptions, including the amount subscribed and due by each one of several hundred persons. This would be unnecessarily and most inconveniently to incumber the record in the case.

And again—the enforcement of the rigid rule of pleading, insisted on in support of this demurrer, would leave the complainants wholly without remedy, and altogether defeat the purpose of their bill. The very prayer of the bill is, that they may have a discovery from the defendants concerning the matters in regard to which the alleged uncertainty exists. If the allegations of the complainants are true, that they do not know, and have not the means of ascertaining these matters, except by a discovery from the defendants, it is very clear they are without any remedy unless they can call on them for a discovery as prayed for in the supplemental bill. The facts about which they are required to answer are within their knowledge, and they

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can not be taken by surprise in being called upon to answer. They certainly know whether they subscribed stock for the purpose alleged, to which company it was subscribed, how much of it has been paid, and what is now due. And I am at a loss to perceive the hardship of requiring them to disclose these facts by their answers. If they or any of them are not indebted, it is a good defense to the claim asserted against them; and if there is a just indebtedness on account of their subscription, the complainants have an equitable claim for it. True, the defendants, if they prefer that course, may decline to answer, and allow a decree *pro confesso* to pass against them. In that event, the court, on application, would direct the master to take and report a statement of the indebtedness of each of the defendants. And, if it should be necessary for this purpose, that the master should examine them touching their indebtedness, one of the rules of chancery practice of this court confers ample authority to do so. The 77th rule is referred to, which provides among other things, in cases of reference to a master, that "he shall have full authority to examine the parties to the cause touching all matter contained in the reference, and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto."

The counsel for the demurring parties insist further, that this supplemental bill can not be sustained for the reason that by the decree in the original case, a master was appointed with power to take and state an account of the subscriptions of these defendants, and other matters concerning which the bill prays for a discovery; also, that by the decree a receiver was appointed with authority to take possession of and dispose of all the assets in question. The argument is, that as the complainants have chosen to adopt this course, they are precluded from calling for a discovery by supplemental bill as the two modes of proceeding are conflicting and incongruous. This presents a question of chancery practice altogether new to me, and in

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regard to which no authorities are cited. I suppose, however, it is clear that if the receiver had actually proceeded under the original decree to reduce into his possession the property or assets, the complainants could not call on the defendants for a disclosure by means of a supplemental bill. But there is nothing before the court showing that either the master or receiver heretofore appointed, have taken any steps in the execution of their appointments touching the matters now in controversy. Indeed, it does not appear that the receiver has accepted the trust, or that he intends doing so. The mere fact that persons were named as master and receiver in the original decree, in the absence of any showing that they have done anything in the performance of their duties, is no bar to the present procedure.

Upon the whole, I can see no sufficient reason for sustaining the demurrer to the bill, and it is accordingly overruled.

(CIRCUIT COURT.)

ENOCH JACOBS v. THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY.

The commissioners of a county are not responsible, in their official capacity, for an infringement of a patent right adopted by a contractor for the construction of a county jail.

Lee & Fisher, for plaintiff.

W. S. Scarborough, for defendants.

OPINION OF THE COURT:

This is an action on the case against the board of commissioners of Hamilton county for an alleged infringement of the plaintiff's exclusive right to certain improvements

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in the construction of jails, secured to him by a patent granted by the United States. The declaration is in the usual form, averring that the defendants "unlawfully and unjustly, against the will of said plaintiff, and without his leave or license," made certain prisons in imitation of the plaintiff's invention, and in violation of his exclusive right under his patent, for which he claims a large sum in damages. To this declaration the defendants have filed a general demurrer, which presents the question now before the court.

There can be no controversy as to the nature of the claim against these defendants as asserted in the declaration. It is a claim against the commissioners of Hamilton county, as a body corporate under the laws of Ohio, for an alleged act of malfeasance committed by them in their corporate character. It is equally clear that if damages are recovered for the wrongful act charged, they can only be paid out of a fund raised or to be raised by taxation on the property of the people of the county.

It is not denied by the counsel for defendants that corporations created by law, enjoying special franchises conferred for the benefit of its members, as well as for the public good, are liable for acts of misfeasance, malfeasance, or nonfeasance, if injuries result to others from such acts. But it is insisted, that under the laws of Ohio, the board of commissioners of a county is not such a corporation, and is not liable in an action sounding in tort.

It is clear this question must be decided by a reference to the statutes of Ohio creating a board of commissioners in every county of the State, and defining their powers and duties. Unless the legislative power of the State, either by express enactment or by clear implication, has imposed a liability on the people of a county to respond to an injured party for damages sustained by the wrongful acts of the commissioners, it does not exist and can not be enforced. Now, it is undoubtedly true that the laws of Ohio have imposed it as a duty on the commissioners of every county

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to provide a court-house and jail, and such other buildings as are needful for the due administration of justice or other specified purposes. But we look in vain for any provision in those laws authorizing the commissioners to do a wrongful act, and pledging the property or the funds of the county to respond in damages for such act.

But the question involved in this case has been settled by the Supreme Court of Ohio, and the decision of that court is authoritative on this court. It involves a construction of the statutes of Ohio relating to the powers and duties of county commissioners, and by the long-settled rule of the Supreme Court of the United States, scrupulously followed by the lower courts of the Union, such a decision, even if against the views and opinions of those courts, will constitute a rule of decision for them.

The case of the *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 109, is decisive of the case before this court. In that case, Mighels brought suit against the commissioners, alleging, in substance, that in the progress of the construction of the county court-house a certain opening or hole in the stairway, leading from the first to the second story of the building, was negligently suffered to remain without any guard or protection, and that the plaintiff, in pursuit of his lawful business, fell into it, thereby sustaining serious bodily injuries, for which he claimed compensation.

In that case the court, after an extended review of the legislation of the State as to the powers and duties of the board of county commissioners, were brought unanimously to the conclusion that they were not liable to the suit of the plaintiff, so far as he claimed damages from the county for the alleged wrongful acts of the commissioners. The court held, that although the statute conferred on the commissioners the power of suing and being sued, which is a capacity or attribute of a corporation, the board was only a *quasi* corporation; and that its power to sue and its liability to suit must be controlled and limited

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by the terms of the statute prescribing in what cases such power and liability existed. And as the power to sue and liability to suit were limited to cases of contract, the statute could not by implication be extended to the case of a tort. The court say: "It is worthy of notice that this statutory enumeration of the matters in respect to which the board of commissioners may sue, is confined to matters of contract. As to all actions, or subject-matter of actions sounding in tort, the statute is silent." And in the closing paragraph of the opinion of the court on the point in question, the court say: "We conclude, therefore, whether we look solely to the language of our statute, and apply to it those principles of construction which seem to be indicated by the narrow range of the objects and purposes of the county organization, or are governed by the light to be derived from analogous cases elsewhere determined; that if this action can be maintained at all, a foundation for it must be found elsewhere than in the provisions of our statute."

The case referred to must be viewed as decisive of the question raised on this demurrer. It can make no difference in the principle of the two cases, that in the case before the Supreme Court of Ohio the tort charged, and for which it was sought to make the board of county commissioners liable in their official capacity, was an act of non-feasance, while in this it is an act of misfeasance. The principle involved is precisely analogous, whether the cause of action alleged is the wrongful omission to perform a duty or a positive act of misfeasance. In either case, there is no law by which the people of a county are responsible to the injured party for an injury sustained by the tort. The right to recover in either case must rest on an express statutory provision. There can be no pretense of any such right in virtue of the common law. This proposition is beyond all doubt in an action for an infringement of a patent right granted under the laws of the United States. The patent itself, with all the privileges which it confers, is the creature of the statute; and it is clear there can be

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exclusively and only out of the subscriptions for the construction of said branch road; that some time after the complainants had entered upon the execution of said contract, the Eaton and Hamilton Railroad Company assigned the branch road from Piqua to Eaton, and the said contract, together with the subscriptions and all funds procured for the special purpose of constructing said branch road, to the Louisville and Sandusky Railroad Company; that company agreeing to construct the branch road, and to comply with the contract made with the complainants, and to apply the subscriptions and funds specially obtained for the construction of the branch road, to that object; that the complainants continued in the execution of said contract until September, 1854, when they were required by said Louisville and Sandusky Railroad Company to suspend operations; and that when they so suspended, there was a large amount due them for work done, and materials furnished, in the construction of the road; that the Louisville and Sandusky Railroad Company suspended all business operations and wholly failed to collect and apply the special subscriptions for the construction of the branch road to the payment of the complainants.

The supplemental bill further avers, that by the original bill it was claimed that the complainants had a specific lien on the subscriptions and funds raised for the purpose of constructing the road from Piqua to Eaton, and were entitled in equity to enforce payment from the persons who had become subscribers of stock for that specific purpose; and the bill prayed an account of such subscriptions and a discovery of the names of those who had thus subscribed and were liable therefor.

The supplemental bill further avers that at the April term of this court, in the year 1858, a decree was entered in the original case against the Louisville and Sandusky Railroad Company, in favor of the complainants, for \$12,181, as the sum due them for work done under their contract in the construction of the Piqua and Eaton road; and that it was

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held and adjudged by said decree that the complainants had a specific claim to, or lien upon, the stock subscriptions made for the purpose of constructing said branch road. And by said decree it was further provided that the case should be referred to a master to ascertain and report the property and effects of the Louisville and Sandusky Railroad Company, which, when ascertained, were to be delivered to a receiver, then appointed by the court. It is then averred that the supplemental bill is filed to obtain "the aid and assistance of this court to carry said decree into execution;" and also, "that the following-named persons became and are subscribers to the capital stock of said Eaton and Hamilton, and to the stock of said Louisville and Sandusky Railroad Company, and that they subscribed their said stock for the special purpose of having the same applied to the construction of said line of road from Eaton to Piqua." Then follows the names of these persons, numbering several hundred, averred to be subscribers or stockholders for the construction of the last-named road, and as to whom the prayer of the bill is, that they may be made defendants thereto, and may be required to answer; and that an account may be taken of the sum due from them respectively, and that they may be adjudged to pay the same to the complainants.

By an amendment to the supplemental bill, it is averred "that each and every one of the said defendants named is indebted on account of their said subscriptions to said stock therein set forth, subscribed for the special purpose of constructing such branch road, and made to said Eaton and Hamilton Railroad, but the complainants do not know, and are unable to state, the several amounts due from them, or any or either of them, and they pray that each and every of them may be compelled to state and set forth by answer on oath the amount respectively subscribed and paid by them, and when and how the same was paid, and when and how the same was subscribed, and that it be referred to the master to inquire and report how much remains due from each and every of them," etc.,

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(CIRCUIT COURT.)

A. T. STEWART & Co. v. SAUL S. HINKLE.

A judgment was obtained by plaintiff against W., and a levy made on his real property to satisfy the same. H. verbally promised to pay plaintiffs the amount of said judgment in six months if he would forbear to collect the judgment against W., and extend the time of the payment of the judgment. *Held*, that such promise by H. was an original and not a collateral promise, and was not required to be in writing within the statute of frauds of the State of Ohio.

The agreement of the plaintiff was a sufficient consideration for the promise of H. to pay the amount of the judgment.

Worthington & Matthews, for plaintiffs.

Mills & Goshorn, for defendant.

OPINION OF THE COURT:

The question before the court arises on a general demurrer to the special plea of the defendant. The declaration is in assumpsit on a special promise by the defendant, and the case made is, in substance, that the plaintiffs had obtained a judgment against one Cyrus M. Williams, in the Common Pleas of Hamilton county, for \$4,750.28, on which an execution had issued, and a levy had been made on several parcels of real estate in Cincinnati, as the property of Williams. It is there averred, that "in consideration of the premises, and that the plaintiffs agreed to release the levy aforesaid and the lien of the judgment, so far as the same existed on the following described real estate of the said Cyrus W. Williams, being part of the same described and levied upon," to wit: two certain lots in said city (which are fully described), "and that the said plaintiffs would forbear to collect the sum of \$1,235.85, part of their said judgment against the said Williams, and would give time for the payment of the said last-mentioned

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sum for the period of six months, the defendant then and there undertook and promised the plaintiffs to pay them the said last-mentioned sum of money at the expiration of the said period of six months." The declaration then alleges that, in consideration of said promise, the plaintiffs released their levy on the two lots above referred to, and the lien of their judgment thereon, and forbore for the period of six months to collect the said sum of \$1,235.85, and gave time for the payment thereof.

To this declaration the defendant has filed a special plea, setting forth that the promise averred was a promise "to answer for the debt, default, or miscarriage of another person," and not being in writing no action can be maintained on it under the statute of Ohio for the prevention of frauds and perjuries. The plaintiffs demur to this plea, and thus the first question for the court is, whether the promise as set forth is within the statute referred to, and is required to be in writing to sustain an action.

On this point the counsel on both sides have referred to numerous cases to sustain their views of the law. I have not regarded it as necessary to attempt a minute analysis and comparison of the cases in which the provision of the statute of frauds referred to has passed under the consideration of the courts. The question now presented is on a demurrer to the declaration, in which the court is not required to decide what evidence will be necessary to sustain the plaintiffs' action, but simply whether the promise as set out in the declaration is valid as a verbal promise. In this aspect the inquiry of the court lies within very narrow limits. It involves, in the first place, the question whether the undertaking of the defendant is original in its character, or whether it falls within the designation of a collateral promise. If it is of the former class, it is not within the statute; if it is collateral, then it is void as not being in writing.

In attempting to distinguish between promises or agreements, as original or collateral in their character, there

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it is clear the plaintiff can not recover. It is, therefore, proper to inquire whether such a consideration is averred. On this subject the authorities are numerous and conclusive. "An agreement to forbear for a time proceedings at law or in equity, to enforce a well-founded claim, is a valid consideration for a promise." 1 Par. on Con. 365, and the authorities there cited. The same writer says, "Nor is it necessary that the forbearance should extend to an entire discharge; any delay which is real, and not merely colorable, is enough." "Nor need the agreement to delay be for a time certain; for it may be for a reasonable time, and yet be a sufficient consideration for a promise." 1 Par. on Con. 367. And again, "It is not material that the party who makes the promise in consideration of such forbearance, should have a direct interest in the suit to be forborne, or be directly benefited by the delay." Ibid. And further, "In general, a waiver of any legal right at the request of another party, is a sufficient consideration for a promise." Ibid. 369.

There would seem to be no doubt that the plaintiff's agreement to release his levy and judgment lien against Williams, and to forbear the collection of a part of the judgment, is a sufficient consideration for the promise of the defendant Hinkle to pay the plaintiffs the sum claimed in this suit. It seems to be supposed by the counsel for the defendant that it must be averred that Hinkle had some interest in the release of the levy and lien, and in forbearing the collection of the sum due on the judgment, to give effect to his promise to pay the money to these plaintiffs. From the authority just cited, it would seem that this is not necessary. It is immaterial whether he is to be benefited by the release and forbearance. But if the law were otherwise, it would not affect the question arising on this demurrer. A good consideration for the promise is averred in the declaration without an averment of the defendant's interest in obtaining a release of the levy and lien on the real estate, and forbearance to proceed on the judgment.

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As a question of pleading merely, the court will presume that the defendant was induced to make the promise to pay, for the reason that he had an interest in disincumbering the real estate from the lien of the judgment and the levy, and procuring for Williams an extension of the time of payment. Whether it may be expedient or necessary for the plaintiff, on the trial, to prove how his interests were connected with these transactions, is not, therefore, on this demurrer, a question for the decision of the court.

Without going more at length into the consideration of this subject, I am led to the conclusion that the promise laid in the declaration is an original, and not a collateral promise, and therefore not within the statute of frauds, required to be in writing. And also that there is a good and valid consideration for the promise set forth in the declaration. The demurrer to the plea of the defendant is therefore sustained.

(CIRCUIT COURT.)

RICHARD A. TILGHMAN v. MICHAEL WERK. IN EQUITY.

Tilghman's invention consists in a process for manufacturing free fat acids and glycerine, by the action of water, in a liquid state, above the ordinary boiling point of water, and, consequently, under pressure, on fatty bodies or substances.

The invention is based on a discovery made by plaintiff that water highly heated and under pressure, *of itself*, possesses a chemical power of decomposing fat bodies into their elements, fat acid and glycerine.

The plaintiff's patent covers all the modes and processes by which the principle of his invention is made operative in practice.

The degree of utility is not pertinent to the question of the validity of a patent, but may, perhaps, form a proper subject of inquiry in estimating the *quantum* of injury resulting from the infringement.

The description of Tilghman's process in his specification is sufficient. A fixed rule is given, which will certainly insure success, and it is also

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made known that certain variations may be made without changing the process.

The gist of the plaintiff's invention is the discovery of a principle in science which he claims to have made practically useful by the process he describes. It is plain that he who adopts that principle, to an available or practical extent, so far invades the exclusive right of the patentee; and to the extent that he has adopted or used the process, is chargeable with infringement.

Hence, where the patentee described a process for the decomposition of fatty matter by the action of water at a high temperature and pressure, so as to dispense with the fourteen per cent. of lime previously used, and the defendant used heated water at a lower temperature and less pressure, and used seven per cent. of lime: *Held*, that this was an infringement of the patent.

The amount which the plaintiff should recover, is to be measured by the profit which the defendant has derived from the adoption and use of the plaintiff's invention.

THIS was a bill in equity, filed to restrain the defendant from infringing letters patent, granted to the complainant October 8, 1854, for an "improvement in processes for purifying fatty bodies."

The nature of the invention will appear from the following extracts from the specification :

"My invention consists of a process for producing free fat acids and solution of glycerine from those fatty and oily bodies of animal and vegetable origin which contain glycerine as their base. For this purpose, I subject these fatty or oily bodies to the action of water, at a high temperature and pressure, so as to cause the elements of these bodies to combine with water, and thereby obtain, at the same time, free fat acids and solution of glycerine. I mix the fatty body, to be operated upon, with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel, in which it can be heated to the melting point of lead, until the operation is complete. The vessel must be closed, and of great strength, that the requisite amount of pressure may be applied to prevent the conversion of water into steam.

"The melting point of lead has been mentioned as the

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proper heat to be used in this operation, because it has been found to give good results. But the change of fatty matter into fat acid and glycerine, takes place with some materials (such as palm oil) at or below the melting point of bismuth, yet the heat has been carried considerably above the melting point of lead, without any apparent injury, and the decomposing action of water becomes more powerful as the heat is increased.

“What I claim as my invention is the manufacture of fat acids and glycerine from fatty bodies, by the action of water at a high temperature and pressure.”

The defendant used a tank, in which he proposed to effect the decomposition of the fat by the direct application of superheated steam to the mass of oil or fatty substances, thus producing fat acids without distillation or the direct application of fire. For this process he obtained letters patent, dated October 5, 1858, in which, after stating that superheated steam alone, of a temperature of from 800° to 900° F., will effect the decomposition, he says that acids and alkalies may be used in combination with the superheated steam to render so high a temperature unnecessary, and states that at a temperature of from 400° to 530° F., the use of seven pounds of lime and fifty pounds of water to every one hundred pounds of fatty matter will be sufficient.

George Harding and Henry Stanbery, for complainant.

N. C. McLean and Charles Fox, for defendant.

OPINION OF THE COURT:

As explanatory of the delay which has occurred in the decision of this case, it is proper to remark that it was argued before Judge McLean and myself, near the close of the October term, 1860. A short time after the argument, and before he could prepare an opinion, that distinguished and lamented judge left this city to take his place in the

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Supreme Court at Washington. After some conference in relation to the case, from which it was apparent there was an entire concurrence of views between the judges as to all the principal points, it was arranged that Judge McLean should take the papers, and write an opinion at Washington. Owing probably to his feeble health through the winter, resulting in his death, he did not, so far as I am informed, state his views in writing, and now, under some disadvantages certainly, it has devolved on me to announce the conclusions of the court.

The plaintiff, Tilghman, has filed his bill in equity, claiming to be the first and original discoverer of a new and useful improvement in the process for the decomposition of fatty substances and oils for practical purposes. He alleges that the exclusive right to his invention is secured to him by letters patent, granted by the United States, dated October 8, 1854; and that the defendant, Werk, has violated the right thus secured to him under his patent, by the use of a certain apparatus and process in the manufacture of fat acids at the city of Cincinnati. The bill prays for a discovery as to the matters alleged, and such relief as the equity of the case may require.

In his answer, the defendant denies, in the first place, that the plaintiff is the first and original discoverer of the method or process described in his specification and covered by his patent; and avers that substantially the same process was known long before the date of the plaintiff's patent, and in practical use in France, and is described in several works published in that country, the authors and compilers of which are named and specifically referred to. The defendant also denies any infringement of the rights of the plaintiff under his patent, and avers that the method or process used by him is essentially different from that claimed and described by the plaintiff, and is the product of his own invention, and is secured to him by a patent, granted October 5, 1858. The answer further alleges, in substance, that the improvement claimed by the plaintiff is of no

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value, and incapable of being practically and economically used by manufacturers.

The plaintiff, in his specification, describes the nature of his improvement as follows:

“My invention consists of a process for producing free fat acids and solution of glycerine from those fatty and oily bodies of animal and vegetable origin which contain glycerine in their base. For this purpose, I subject these fatty or oily bodies to the action of water, at a high temperature and pressure, so as to cause the elements of these bodies to combine with water, and thereby obtain, at the same time, free fat acid and solution of glycerine. I mix the fatty body, to be operated upon, with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel, in which it can be heated to the melting point of lead, until the operation is complete. The vessel must be closed, and of great strength, that the requisite amount of pressure may be applied, to prevent the conversion of the water into steam.”

This comprehends substantially the nature of the invention claimed by the plaintiff as new and original. The other part of the specification describes minutely and with great clearness the apparatus and appliances by which the proposed result is produced. It is not necessary to notice critically the process as described, as the defendant's answer takes no exception to the sufficiency of the specification.

I. As to the originality of the invention claimed by the plaintiff and covered by his patent.

It appears, from the above extract from the specification, that the invention of the plaintiff consists in a process for the manufacture of fat acids and glycerine, by the action of water, in a liquid state, above the ordinary boiling point of water, and, consequently, under pressure, on fatty bodies or substances. The invention is based on the discovery, claimed by the plaintiff to be original with him, that water, under the conditions above set forth, of itself, possesses a

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chemical power of decomposing or separating fat bodies into their elements, fat acid and glycerine.

Now, the answer of the defendants sets up that the same process is described in Payen's Chemistry published in the year 1851; in Regnault's Chemistry, published in 1853; and in Roret's Encyclopedia. These are all French publications, of dates anterior to the date of the plaintiff's patent; and, under the patent laws of the United States, if any of the processes described are identical with the invention claimed by plaintiff, it is fatal to the validity of his patent. By reference to these publications, and to the testimony of the distinguished experts which is before the court, the inference seems to be irresistible that there is a substantial difference between the processes they describe and that patented to the plaintiff. Neither of the works referred to describe or notice any such chemical decomposing power pertaining to water at a high temperature, and under pressure, which constitutes the main element in the discovery claimed by the plaintiff. Regnault and Payen describe a process of decomposition consisting in a separation of fat acids by the destruction of the glycerine, one of the elements of the fatty body, but do not mention the use of water highly heated, under pressure, as the decomposing agent. In the description contained in Roret's Encyclopedia, lime is required as the decomposing agent, in quantities sufficient to effect the separation of the fatty body into fat acid and glycerine. No allusion is made to the process described by the plaintiff, and which is the distinguishing feature of his invention. In confirmation of this view of the publications referred to, and as conclusive of the point under consideration, it may be remarked that the experts examined on behalf of the plaintiff—Professors Booth, Rogers, and Genth, gentlemen of distinguished reputation in the walks of science, and who profess to be acquainted with the French works referred to—unite in saying that they describe no process resembling or identical with that described by and patented to the plaintiff. They also agree in saying

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that in so far as their knowledge and research extend, there is no publication extant which describes the plaintiff's process, and, in their judgment, it is new and original with him; and even the scientific gentlemen who have testified, as experts, on behalf of the defendant, do not say that they have knowledge of any work or publication, dating back of the plaintiff's patent, which describes his process. The invention of Milly & Motard, described in Roret's Encyclopedia, is perhaps a nearer approximation to that of the plaintiff's than any other referred to by the defendant. They describe a close boiler, in which fat and water were subjected to the action of high temperature and pressure. But, in their process, they do not rely on these agencies to effect the separation of the elements of the fatty bodies, but require lime in sufficient quantities, to combine with all the fat, and thus prevent the formation of any free fat acid.

So, too, it appears, that in the patent of Arthur Dunn, described in Vol. II., second series of the Repertory of Patent Inventions, he used a steam-tight vessel, and applied a temperature of 310° F., and, by the use of soda, produced soda soap, and not free fat acid.

It is obvious that, in all the descriptions of these processes, they are essentially different from the plaintiff's invention, by whose apparatus free fat acid is produced solely by the chemical action of water, at a high temperature, under pressure.

It is certainly true that some of the discoveries referred to, especially Milly & Motard, and Dunn, approached very nearly to the discovery of the plaintiff; but as certainly stopped short of the object. They failed to reach the important chemical truth, that highly heated water, under pressure, will produce from fatty bodies free fat acid and solution of glycerine without any other agency.

This view is most convincingly exhibited by the testimony of the experts who have been examined as witnesses. It is also sustained by the commissioner of patents, who in his note to the defendant Werk, of June 26, 1858, rejecting

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his first application for want of novelty, distinctly informs him that Mr. Tilghman is the acknowledged discoverer of this process.

I have no hesitation in concluding that the attempt to invalidate the plaintiff's patent for want of originality in his invention has wholly failed.

II. The patent, however, is assailed on other grounds, which I will briefly notice.

First. It is insisted that while it may be practicable to separate fatty bodies by the action of heated water, according to the plaintiff's process, it can not be economically and practically used, and therefore the invention patented is of no utility. The defendant, in his answer, while he does not take issue distinctly on the utility of the invention, alleges that it is liable to two objections, which prevent it from being of practical use. The first is, that the great heat required to produce the result proposed, will speedily destroy or greatly injure the tank and pipes employed; and, second, that so much time is required in completing the process, that practically it is of no utility.

As to this point, it is only necessary to advert to the familiar principle in the law of patent rights, that a presumption of the utility of an invention arises from the grant of the patent; and this presumption can only be repelled by clear proof that it is utterly worthless. There is not only no such evidence in this case, but it is proved upon actual experiments that the plaintiff's process has been successfully applied to practical use. What may be the degree of utility is not an inquiry pertinent to the question under consideration, but may, perhaps, form a proper subject of inquiry hereafter, if it is proved that the defendant has infringed the plaintiff's patent, in estimating the *quantum* of injury which has been sustained.

Second. It is also contended, by the defendant's counsel, that the patent of the plaintiff is a nullity, because it does not describe the process by which the result claimed is to be produced with sufficient precision, and that no one,

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though skilled in the business, could determine, except by experiment, the precise degree of heat required.

On this point it may be remarked, in the first place, that the defendant has offered no evidence tending to prove the existence of any practical difficulty in the use of the process described in the plaintiff's specification. The learned experts who have testified for him, say they have tested the practicableness of the described process, by actual and successful experiments. And it also appears from the evidence of the witnesses, Ropes and Grant, that they have actually produced free fat acid and solution of glycerine by the plaintiff's process, making no mention of any difficulty from a want of exactness in the specification as to the degree of heat required. And referring to the specification, it seems to be sufficiently explicit to answer the requirements of the statute, construed in the liberal spirit in which, by repeated judicial decisions, this instrument should be viewed. The language of the specification in reference to the temperature of the heated water is as follows:

“The melting point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results. But the change of fatty matter into fat acid and glycerine, takes place with some materials (such as palm oil) at or below the melting point of bismuth, yet the heat has been carried considerably above the melting point of lead, without any apparent injury, and the decomposing action of water becomes more powerful as the heat is increased.”

Now, it is well known that lead melts at 612° Fahrenheit, and bismuth at about 510°. There is, then, a precise degree of heat—612°—recommended and prescribed as sure to produce a good result in changing common fatty bodies to acid and glycerine—and a lower temperature—the melting point of bismuth—510°—when palm oil or similar substances are to be operated upon. And it clearly does not render the specification liable to objection for want of certainty and clearness, that the patentee states that the degree

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of heat may be carried above these figures without injury. Nor is the sufficiency of the description impeached by the fact that the desired result has been produced at a lower temperature of water. There is a fixed rule given which may be safely followed, while it is made known that the manufacturer may safely depart, to some extent, from this rule, if, from experiment and a just exercise of discretion, it should be expedient to do so. This specification is not therefore, liable to the objection urged in argument, and so often referred to in the books, that the process described can not be carried out without the necessity of previous experiments.

Third. Another ground of objection to the validity of the patent is, that it is merely for a *principle*, and not for a process, and therefore void.

It seems to the court this objection is fully met by a reference to the words of the patentee in describing his invention. In the introductory part of his specification, he claims to have invented "a new and improved mode of treating fatty and oily bodies," and continues as follows: "My invention consists of a *process* for producing free fat acids and solution of glycerine," etc.

Now, it is well settled, and needs no citation of authorities to prove it, that the discovery of a new and abstract principle in science or mechanics can not be the subject of a patent. And clearly, if this patentee has discovered merely the *principle* or scientific fact, that superheated water, by its own power, will effect the decomposition or separation of fatty substances into acids and solution of glycerine, he could not have obtained a patent; or, if a patent issued, it would be void.

But he claims and has described more than this. He claims the discovery of a new principle, and a process by which that principle may be made practical and operative. This *process* is minutely and fully described, and that is all the law requires. It has been adjudged a patentable invention by the officer of the government selected with special

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reference to his qualification for the position, and by him a patent has been issued, securing to the patentee the exclusive benefit of his invention, for the term prescribed by law. I do not feel called upon to overrule and set aside the judgment of the commissioner of patents, in the case now before me.

III. The next inquiry relates to the question of infringement.

The bill alleges that the defendant "is now constructing and using the said patented improvement in some part thereof, substantially the same in construction and operation as in said letters patent mentioned."

On the point of infringement, a mass of evidence has been offered on both sides, and it has been discussed at length by counsel. Without reviewing the evidence in its details, I will state, as concisely as I can, the conclusions to which I have arrived; and I may remark that as there seems to be no controversy as to the process or appliances by which the defendant decomposes fatty bodies, it is unnecessary here to describe them with minuteness.

The sole inquiry is, whether the mode or process used by the defendant is substantially identical, in whole or in part, with that patented to and used by the plaintiff?

The invention of the plaintiff has been already sufficiently noticed.

As to the defendant's invention it appears, that in May, 1858, he applied for a patent, and filed his specifications describing his invention and the process by which it was to be made practical. He there claimed as his invention "the manufacture of fat acids by subjecting fatty or oleaginous bodies to the direct action of superheated steam, either with or without the use of other agents."

This application was rejected for the reason stated by the commissioner, that the invention claimed by the defendant was covered by the previous patent granted to the plaintiff.

The defendant filed a new application, in which he modified his original claim and describes his invention as

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consisting "in the combination and arrangement of the apparatus as herein set forth, for the *saponification* of fatty bodies." And this he proposes to effect by the direct application of superheated steam to the mass of oil or other fatty substances, and thus producing fat acids without distillation or the direct application of fire. In his conclusion, he claims, as new, "the combination of boiler, superheating furnace, and tank." In the description of his process, he says: "The superheated steam alone, of a temperature of from 800° to 900° F., will effect the decomposition, but acids and alkalis may be used in combination with the superheated steam to render so high a temperature unnecessary." He then states that at a temperature of from 400° to 530° F., the use of seven pounds of lime and fifty pounds of water to every one hundred pounds of fatty matter will be sufficient for the superheated steam. Thus modified, a patent was granted to the defendant October 5, 1858.

In his answer, the defendant calls his invention "a combination of machinery, or improvement in apparatus for manufacturing fatty acids, etc., by superheated steam, and a tight tank by which the fatty acids are produced without distillation, or the direct action of fire." He also states that the fatty substances are placed in the tank, closed at the top to retain the heat and steam, with six or seven pounds of lime, and one hundred and thirty pounds of water to every one hundred pounds of the fatty matter, and introduces steam heated to 340° or 350° F., which, in connection with the action of the lime and water produces a lime soap, and sets the glycerine free in five hours after the operation is begun. The lime soap is afterward decomposed by the use of sulphuric acid, and the fat acids become free.

This synopsis of the defendant's invention, as described and used by him, sufficiently exhibits its essential features. And the question for decision is, whether in any of its processes, or modes of operation, it infringes any right granted to the plaintiff by his patent.

It has been before stated, that the claim of the plaintiff

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is in substance, that, by his process, superheated water, under pressure, is the sole agent in the decomposition of fatty substances, and separating them so as to form free fat acids, and solution of glycerine.

Does the defendant's process effect, or is it capable of effecting, the same result by substantially similar means?

In giving an answer to this question, it is unnecessary to institute a critical comparison of the machinery and appliances respectively used by the patentees. It is not controverted that they are essentially alike. The defendant produces the heat necessary to decompose the fatty mass in his tank, by the use mainly of steam heated to a high temperature, which necessarily causes the water forming a part of the contents of the tank, to rise to the same temperature as the steam, thus avoiding the direct application of fire to the tank, according to the process he describes; and by his distinct admission in his answer, a portion of water is used as a decomposing agent. It is also proved by the witnesses, that, in the defendant's process, water is required and used. And it is clear that, in that process, it is the superheated water, necessarily under pressure, which effects, to a certain extent, the decomposition of the fatty contents of the tank.

The scientific gentlemen examined as witnesses for the plaintiff unite in saying, after full experiments, that, in their judgment, this result is due to the chemical action of the superheated water, on the precise principle of the plaintiff's invention.

It is true that two experts, called as witnesses for the defendant, state it as their belief, not based, however, on experiment, that the decomposition can not take place at a temperature of water less than 550° or 600°. And hence it is urged by the counsel for the defendant, that there is no identity in the two processes.

In support of this view, it is insisted, that in the defendant's process the water is heated only to 350° or 400°, and at that temperature can have no decomposing power, and

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therefore that the processes are essentially different in principle.

The fact relied upon to sustain this position is not made out by the evidence. The opinions of the two chemical experts referred to, can not prevail against the positive statements of no less than five witnesses, that by experiment it is found that, at a temperature of 350°, the heated water, under pressure, as applied by the defendant, will produce free fat acid by its chemical action alone.

As I understand the law, the plaintiff's patent covers all the modes and processes by which the principle of his invention is made operative in practice. In Curtis on Patents, section 233, the author says: "These cases show that when a party has invented some mode of carrying into effect a law of natural science, or a rule of practice, it is the application of that law or rule which constitutes the peculiar feature of his invention; that he is entitled to protect himself from all other modes of making the same application; and, consequently, that every question of infringement will present the question whether the different mode, be it better or worse, is in substance an application of the same principle. The substantial identity, therefore, that is to be looked to in cases of this kind, respects that which constitutes the essence of the invention, viz: the application of the principle."

On this point the authorities are numerous; but it seems to the court unnecessary to make a special reference to them. It is clear the plaintiff, in this case, does not, in his specification, restrict himself to any certain or fixed temperature of heated water as necessary to produce the required result. He names the melting point of lead, 612°, because, as he says, it is known to operate successfully; but he does not say, or intimate, that a higher or lower temperature may not be expedient or useful. He does indeed state, what would be entirely obvious without it, that the rapidity of the process of decomposition, by the chemical action of the heated water, will be in proportion to the

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degree of its heat. He has, therefore, in effect, provided for a much higher temperature than 612° , by recommending the use of a tank strong enough to resist a pressure of ten thousand pounds to the inch.

There is but one other point connected with the question of infringement, to which it seems necessary to advert. I refer to the position assumed by the counsel for the defendant, which, as I understand it, is, that if the defendant has adopted the principle of the plaintiff's invention in part only, and uses an agency in his process, which is not a part of the plaintiff's invention, he does not infringe his right under his patent.

It is contended, and the evidence proves it, that the defendant uses two distinct agents in his process. He has the superheated water, and, in addition, uses six or seven pounds of lime to each one hundred pounds of the fatty mass in the tank.

The result of this, as appears satisfactorily from the evidence, is, that a part of this mass is converted into free fat acid, and a part is saponified or converted into what some of the experts designate as an acid lime soap.

There seems to be no question that the production of the free fat acid is due solely to the decomposing power of the heated water, and the saponifying effect to the alkaline properties of the lime acting on the mass of fat.

As to the first of these effects, the production of free fat acid, the precise principle which constitutes the distinguishing feature of the plaintiff's invention is clearly brought into requisition in the process.

As to the other, the saponifying action of the lime, there is no invasion of the plaintiff's claim, for the obvious reason that he does not name or provide for the use of lime in the process described in his specification.

Upon this state of facts, the question is, has the defendant so far appropriated the invention of the plaintiff as to render him liable for an infringement? The answer to this

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inquiry seems so obvious that I shall not discuss it at any length.

The principle is undoubted, that in a patent for a mechanical structure, the novelty and utility of which consists wholly in a combination of things before known and in use, there is no infringement by the use of any of the separate parts of the combination.

But this principle can have no application to the present case. The gist of the plaintiff's invention is the discovery of a principle in science, which he claims to have made practically useful by the process he describes. Now, it seems plain that he who adopts that principle, to an available or practical extent, so far invades the exclusive right of the patentee. The logical sequence of the opposite doctrine would be, that there could be no infringement unless the patented invention was adopted to the extent of producing the full results proposed by the patentee. In the case of this defendant, his discovery, which constitutes a distinct part of his claim, that a small percentage of lime will facilitate and hasten the decomposition of the fatty mass in the tank, may be and probably is useful and meritorious, and would well entitle him to a patent; but certainly it gave him no right to adopt the plaintiff's invention in giving effect to his own. His claim for a patent should have rested on the fact, that he had discovered an improvement of the principle and process covered by the prior patent to the plaintiff. To the extent, therefore, that he has, without the license or authority of the plaintiff, adopted and used his process, the defendant is chargeable with an infringement.

It is perhaps to be regretted that the defendant, in applying for a patent, had not limited his claim to an improvement of the plaintiff's invention. In that form his patent would have been sustainable, and would have been beneficial, not only to the defendant, but the public. It is in evidence that under the old process of separating fatty matter for manufacturing purposes, fourteen pounds of

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lime were required to every one hundred pounds of the mass, which produced lime soap; and the separation of this soap into free fat acid and glycerine, required the use of thirty-five per cent. of sulphuric acid. This was an expensive process; and the discovery that, through the joint agency of superheated water, and six or seven per cent. of lime, the desired result could be speedily and successfully effected, was in an economical view, an important invention, and apparently of practical utility.

I can not hesitate upon the law of this case, applicable to the facts proved, in holding, first, that the plaintiff's patent is valid to the extent of his claim—and, secondly, that the defendant has infringed upon the plaintiff's patented rights to the extent indicated. In the present posture of the case, it is obvious no decree can be entered for damages arising from the infringement. The rule of compensation sanctioned by the express provision of the statute, is the actual damage sustained by the plaintiff; and this damage is measured by the profit which the defendant has derived from the adoption and use of the plaintiff's invention. But in this case, this adoption and use have only been to a partial extent, and there are no data before the court by which the profit to the defendant can be ascertained. The amount of the recovery in the case can not be great—and it may be, the plaintiff does not desire a decree for damages. While it is clear from the evidence that it is practicable by the plaintiff's process alone to effect the decomposition of a fatty mass as claimed by his patent; yet it is perhaps questionable whether it can be successfully adopted by the manufacturer. The evidence shows that about twenty hours are required to effect the desired result by this process; and some of the witnesses are positive, that in this country at least, the length of time required to perfect the process is a fatal objection to its practical use. It appears that those who have tried it have found it necessary to expedite the process of decomposition by the use of from one-half to two per cent. of

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lime; and with this addition the trials have been very successful. But the plaintiff, under the conviction that the use of superheated water, under pressure, would, of itself, effect the desired end, has made no claim for the use of lime in his process, and can not complain of its use as an invasion of his rights.

If the plaintiff desires it, the case will be referred to a master to inquire into and report the actual profit which the defendant has derived from the adoption and use of the plaintiff's process, to the extent that it has been adopted and used by the defendant.

A decree may be entered in accordance with the views stated by the court.

(CIRCUIT COURT.)

THEODORE T. WOODRUFF, JOHN S. MILLER, ORVILLE W. CHILDS, AND GEORGE R. DYKEMAN v. ELAM E. BARNEY, C. PARKER, S. F. WOODSUM, AND J. A. TENNEY.

The words "pursuant to law," in the act of February 26, 1853, are equivalent to the word "summoned," in the act of February 28, 1799, and, in both cases, import that witnesses who attend without being summoned, are voluntary witnesses, whose fees can not be taxed against the losing party.

If a witness, whose residence is not at the place of holding court, is summoned at the place of trial, he is allowed mileage for returning to his home, but not for coming to the court; and by a liberal construction of the statute, return travel has been allowed, even beyond the limits of the district for which the court was held.

Models of the invention described in the plaintiff's patent, and procured by the defendant in good faith, may be included in the taxation of costs, but not other models.

Copies of patents, either that of the plaintiff or others, procured by the defendant, can not be taxed as costs to the plaintiff.

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This was a motion to retax costs. The facts sufficiently appear in the opinion of the court.

Georye E. Pugh, for plaintiffs.

T. D. Lincoln, for defendants.

OPINION OF THE COURT:

On the part of the plaintiffs in this case, a motion is made to retax the costs, by striking from the cost-bill the charges for mileage to such of the defendants' witnesses residing out of this district, and more than one hundred miles from Cincinnati, as attended at the request of the defendants, and without service of process requiring their attendance. And the defendants move for a retaxation, by which they may be allowed for expenses incurred in procuring certain models and copies of patents deemed necessary in their defense.

The plaintiff's motion will be first considered. It presents simply the question whether a party, against whom a judgment for costs has been entered, is chargeable with the mileage of the witnesses who have attended without being summoned by legal process.

The facts necessary to notice, and about which there is no controversy, are, that the suit was brought for alleged infringements of four different patent rights for distinct improvements in railroad sleeping cars, of which the plaintiffs had the title by assignment from the patentee. The defendants, by their pleas, put in issue, not only the infringements charged, but also the novelty of the different patented improvements. The case was on the docket for trial at the last December term, and, by arrangement between the counsel, was continued to, and especially assigned for trial, on the first day of the last June term.

When called for trial at that term the plaintiffs entered a discontinuance of the suit, and a judgment was rendered against them for costs, in the usual form. A large number of witnesses, residents of the city of New York, and per-

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haps other places outside of this district, were in attendance at the December and June terms, on behalf, and at the request of the defendants, without being summoned, either out of, or within the district. At each of those terms, these witnesses proved their attendance before the clerk; and in taxing the costs against the plaintiffs, mileage is allowed to them at both terms, for travel in coming to and returning from Cincinnati, the place of holding the court. There is no reason to doubt that these witnesses attended in good faith. It appears satisfactorily to the court, that their testimony was deemed material by the distinguished counsel for the defendants, by whose advice they were requested to attend.

The subject of costs in cases at law, in the courts of the United States, is wholly governed by statute, and is not dependent on the discretion of the judges of those courts. Section 6 of the act of Congress of February 28, 1799 (1 Laws U. S. 626), after providing that jurors shall receive a per diem compensation for their attendance, and fees for traveling at the rate of five cents per mile from their place of abode to the place of holding court and the like sum for returning, closes with this provision: "To the witnesses *summoned* in any court of the United States, the same allowance as is provided for jurors." In the case of *Driskell v. Parrish*, 5 McLean, 213, it was held by this court, under the act of 1799, that the fees of a witness who voluntarily appeared without subpoena, could not be taxed to the losing party in the case. Judge McLean, who gave the opinion of the court, says: "If he (a witness) attend voluntarily, or without summons, his fees can not be taxed against the losing party. The attendance, if not summoned, is voluntary." And again: "The service must be made by the marshal, or one of his deputies. As no such service was made on the witnesses above named, their per diem and traveling expenses can not be charged to the defendant, but must be taxed to the party summoning them."

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In a case between the same parties (5 McLean, 241), the same question arose and was decided in the same way.

But it is insisted by the counsel for the defendants, that the above cases were decided under the old law, and that the act of 1853, under which the taxation in the present case was made, is different in its terms, and justifies a different construction. There can be no doubt that the latter act must control the question before the court. It provides, in section 1, that the fees which it allows to the various officers and persons named, shall be "in lieu of the compensation now allowed by law;" thus virtually repealing the act of 1799, so far as it regulates the fees and compensation of those referred to. The provision of the act of 1853, relating to witnesses' fees, is in these words:

"For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for traveling from his place of residence to said place of trial or hearing, and five cents per mile for returning."

Thus it will be seen that the diversity in the phraseology of the act of 1799 and the act of 1853 is this: by the former act, witnesses *summoned* to attend court were entitled to a certain per diem compensation, and mileage to and from the place of holding court; and by the latter act, they are allowed, "for each day's attendance in court, or before any officer pursuant to law," mileage at the rate of five cents per mile in going to and returning from court. But clearly, the language of the two sections is of the same legal import. In the one, is required expressly the service of a summons; in the other, the witness must attend "pursuant to law." Now, by every just rule of grammatical construction, these words must be held to apply, both to witnesses attending a court, and to those attending before an officer having authority to summon witnesses. In either case, to entitle them to compensation, they must attend, *pursuant to law*, and not merely on the request of a party without process. The words of the act of 1853 are more

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comprehensive than those used in the old law, and were adopted to supply an obvious omission in that law. The old law did not provide for the case of a witness attending before a master in chancery, commissioner, or other officer, authorized for any purpose to call witnesses before him; nor did it provide for a witness attending before a court, under a recognizance by which he was legally bound to attend. These cases are plainly embraced in the act of 1853. But clearly there is not a word in that act, from which, by any just reasoning, it can be inferred that a witness who voluntarily attends, can claim per diem compensation, or allowance for traveling.

The case of *Whipple v. Cumberland Cotton Co.*, 3 Story, 84, referred to by the counsel for the defendants, does not sustain the taxation of the witnesses' fees in the case before the court. The decision of Judge Story was to the effect, that if a material witness for a party residing in another State, or more than one hundred miles from the place of holding court is *summoned* to attend court, his travel may be allowed and taxed to his place of residence. This rule was also recognized by Judge Woodbury, in *Hathaway v. Roach*, 2 W. & M. 63. In these cases, however, the witnesses were actually served with process requiring their attendance, though it does not appear in the reports whether they were summoned within or without the district. And this accords with the practice in this court. If a witness whose residence is not at the place of holding court is summoned there, he is allowed mileage for returning to his home, but not for coming to the court. And, by a liberal construction of the statute, return travel has been allowed, even beyond the limits of the district for which the court was held. But it has never been held by this court or any other, that the fees of a witness attending merely by the request of a party, without subpoena, can be legally taxed against the losing party, as a part of the costs for which he is liable. Such a witness, under the act of 1799, is not

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“summoned,” and under the act of 1853 does not attend court “pursuant to law.”

The construction contended for by the defendants' counsel would not only conflict with the plain reading of the acts referred to, but would open the door to great abuses. If a party in any case could, by mere request, procure the attendance of any number of witnesses, from remote parts of the country, and tax their travel to his adversary in case the judgment was against him, he would not only be subject to a ruinous amount of costs, but might be taken wholly by surprise at the trial. No process having been ordered to procure the attendance of the witnesses, he could not anticipate their presence, and would have no means of contradicting or counteracting their evidence. There is no principle of public policy or justice justifying such a practice. If a witness resides out of the district in which the court is held, or at a greater distance than one hundred miles from it, the act of Congress authorizes his deposition to be taken and used on the trial. It is undoubtedly true that it is often desirable to have the personal presence of a material witness, as the oral examination before the court and jury is more satisfactory than his testimony presented in the form of a deposition. But this is for the benefit of the party who wishes the testimony thus exhibited. He can not, however, avail himself of this benefit at the expense of his adversary. If he brings witnesses into court without process, he must pay them for their attendance. He may relieve himself from this burden in part at least, by causing them to be served with process after they come within the district. This, however, the defendants, for reasons best known to themselves, failed to do, and the witnesses, therefore, who attended, can be regarded only as mere volunteers, and their fees can not be taxed against the plaintiffs as a part of the legal costs. The plaintiffs' motion to retax is therefore sustained, and the fees of these witnesses will be excluded from the taxation.

I have yet to consider the motion by the defendants, to

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include in the taxation the expense of procuring models of sleeping cars, and copies of patents from the Patent Office. These, it is insisted, were necessary for their defense, and were obtained by them in good faith; and that they should be indemnified for this outlay. The issues presented by the pleadings were no doubt numerous and somewhat complicated, by reason of the number of distinct improvements, which were claimed as embraced in the four patents held by the plaintiffs. The novelty of all these improvements was in issue, under the various notices given by the defendants, and it was, doubtless, necessary, in sustaining their defenses against the alleged infringements, to exhibit these models to the jury. It would materially assist them in coming to a conclusion as to the novelty of the claims of the patents. The defendants allege that they procured these models at an expense exceeding six hundred dollars. Can this be taxed to the plaintiffs as a part of the legal cost in the case? There is no statutory provision by which such an expenditure is taxable as costs; and it is perhaps within the discretion of the court to tax them, if necessary to the processes of justice. It does not occur to me that this question has before been presented for the decision of this court. Nor are any authorities referred to, which sustain the claim of the defendants' counsel to the extent urged by them. It is obvious that it would subject litigants in contested patent cases to onerous burdens, if either party was permitted, *ad libitum*, to procure models, and tax his unsuccessful adversary in the case with the entire expense. I am not aware that any of the courts of the United States have given any sanction to such a principle. The case of *Hathaway v. Roach*, 3 W. & M. 63, is referred to by counsel, but clearly it does not sustain the claim of the defendants in this motion. That was an action for the infringement of the plaintiff's exclusive right to certain improvements in a stove, for which a patent had been granted. The defendant had procured several models of stoves, to be used on the trial, and the expense of these had been taxed

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in the bill of costs. Judge Woodbury held, that so far as these were models of stoves described in the plaintiff's patent, as the plaintiff was not bound to exhibit them, it was proper for the defendants to produce them to be used on the trial. To that extent he held, that the expense was properly carried into the taxation of costs. These models, the learned judge remarks, "were likely to be beneficial in explaining the patent, and were competent evidence of its coincidence or difference compared with other stoves, as they related to the doings of the plaintiff himself on the subject of his patent. The judge proceeds to say: "If other models are taxed, I do not think them proper items for the bill of costs, any more than the drawings of other patents procured, or the books which describe them; they all being rather arguments than proofs."

I concur with Judge Woodbury in the case cited. It is reasonable and just, that so far as the defendants in this case have, in good faith, procured models of sleeping cars, or improvements therein, embraced in the four patents, for the infringement of which the plaintiffs have brought suit, they should be indemnified, and to that extent the expense of the models may be included in the taxation. The court is not informed how many, if any, of the models procured by the defendants, fall within the rule prescribed. If necessary, it can be referred to a competent expert to inquire and report, as to the number and cost of the models procured by the defendants, which correspond with the improvements described in the plaintiffs' patent, and are claimed by the patentee as his inventions.

As to the copies of patents obtained by the defendants from the Patent Office, I do not know of any principle or any precedent by which the expense can be taxed as costs in the case. I am not aware of any case in which it has been allowed in this court, nor of any authority which sanctions it. If the motion now made includes the expense of copies of the plaintiffs' patent, it can not be allowed, for the obvious reason that the plaintiffs are bound to exhibit

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these as a necessary part of their evidence, and there could be no necessity that the defendants should procure them. If they are copies of patents for other improvements, not included in the patents held by the plaintiffs, they are clearly within the decision of the court in the case of *Hathaway v. Roach*, before referred to, and the expense must be excluded from the cost-bill. If the defendants deemed these copies necessary in making their defense, the plaintiffs can not be held chargeable with their cost. It is possible that there may be circumstances, which being made known to the court before the trial of the case, an order would be made authorizing the procurement of copies of patents or other documents, the cost of which might be taxed in the case, to await the result of the trial. Without such previous order, I am clear, they can not be properly included in the taxation. This part of the defendants' motion is therefore overruled.

(DISTRICT COURT.)

JOHN H. ATKINSON v. THE STEAMBOATS R. B. HAMILTON AND
H. LOGAN.

Where a collision is the joint act of two steamboats, there can be no objection to the joinder of both as defendants in an action.

If each boat is charged with a distinct and separate act of collision, without any allegation of privity between them, or concert or unity of purpose, they can not be joined in the same libel.

Lee & Fisher, for libellant.

Lincoln, Smith & Warnock, for respondents.

OPINION OF THE COURT:

An exception to the libel has been filed in this case, based on an alleged misjoinder of distinct causes of action, and of two defendants, as between whom there is no privity in the facts set forth in the libel as the grounds of the action. In

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deciding on this exception, the court must view it in the light of a demurer in an action at law. The only question therefore is, whether from the statements and averments of the libel, the alleged misjoinder is apparent, and of a character to render it impossible to enter a valid decree in the case.

The suit is *in rem.* against the steamboats Hamilton and Logan for an alleged collision, by which a keel-boat laden with fire-brick, fire-clay, etc., the property of the libellant, was sunk in the Ohio river while on its way from New Cumberland, in the State of Virginia, to the city of Cincinnati. The keel-boat and its cargo are alleged to have been a total loss to the libellant, and damages are claimed for the full value thereof. In the introductory part of the libel, it is averred that the suit is brought against the steamboats named, "jointly and against both and each of them." After stating that the keel-boat was navigated with all proper care and skill, and that every precaution was used by those having it in charge to avoid a collision, the libel alleges that the two steamboats, then ascending the river, were unlawfully engaged in racing, and were attempting at an undue speed to pass each other; and being just abreast, "almost simultaneously came into collision with said floating keel-boat—the bow of the said Henry Logan striking said keel-boat near her bow with a force sufficient to sink said keel-boat, and cause the same, her cargo, etc., to become a total loss, and the bow of the said Hamilton almost at the same time coming in violent collision with said keel-boat about ten or fifteen feet forward of her stern, with force also sufficient to sink her, and cause her to become a total loss." It is then averred, that as the result of these collisions the keel-boat was sunk, and that boat and cargo are a total loss to the libellant.

Upon these averments, the question presented, is whether the collisions were the joint act of the two steamboats, in the sense of making each collision the act of both. If this is the logical and legal import of the averments of the libel, there can be no objection to the joinder of both in

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this action. On the other hand, it is clear, if each boat is charged with a distinct and separate act of collision without any allegation of privity between them, or concert or unity of purpose, they can not be joined in the same libel. Such a course would be liable to the same objections that would lie to the joinder of two different persons for two distinct acts of trespass or misfeasance, in an action at law. It needs no citation of authorities to prove that this can not be done. In analogy to the settled principles of chancery, as connected with the frame of a bill, a libel thus setting forth the cause of action, would be liable to the objection of multifariousness in averring different causes of action, necessarily leading to distinct issues, and involving confusion and inconvenience in the trial. Its further practical effect would be to bring parties defendants before the court, between whom there is no privity, and who in defending the action might find it necessary to assume distinct grounds of defense and to rely on wholly different evidence.

In 1 Conkling's Admiralty, 368, the author asserts, in very comprehensive terms, that "persons between whom there is no privity, can neither join as libellants, nor be joined in the same libel as respondents." And this doctrine, the learned author says, is alike applicable to cases arising *ex contractu* and *ex delicto*. In the case of *Thomas v. Lane*, 2 Sumner, 1, Judge Story held, that a libel charging two persons with distinct acts of assault and battery, could not be sustained. The learned judge says, "If the trespasses are different and distinct, several suits must be brought against the parties; and if they are joined, the libel ought to be dismissed for multifariousness and a misjoinder of parties." There can be no question that this doctrine applies to all actions sounding in tort, as well as to the action of trespass for an assault and battery. Suits for collisions always involve the commission of a tort, predicated of some act of carelessness, negligence, or want of skill. And if the acts charged are the separate acts of different boats, not acting in concert and with a common pur-

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pose, they can not be joined in the same action. And this doctrine does not at all conflict with the doctrine well settled, and of universal application, that tortfeasors are liable both jointly and severally, and may be sued either jointly or severally. But this principle must be limited in its application to cases in which the parties have acted in concert in the commission of the tort, and resting under a common responsibility. Betts' Ad. Prac. 20.

Now, it may undoubtedly occur that two boats may be so acting in privity and with a common purpose, that both may be jointly responsible for an injury inflicted by either. If two boats, for any purpose, should be lashed or fastened together, and while thus connected, from carelessness or want of skill should injure another boat by collision, there can be no doubt that there would be a joint liability, and that both could be proceeded against in the same suit. In such a case, in legal estimation, the two boats would be considered as one, and both under the same management and control. But clearly, to sustain such a proceeding, there must be the distinct allegation that they were thus in privity or union; and on the hearing, such allegation must be proved.

In this libel there is clearly no such averment of concert or unity of action between these boats as to justify the conclusion of a joint liability. It is not averred that the boats were the property of the same persons, or that there was any mutuality of interest as between the owners, or that they were both under the control of the same persons. Nor is it averred that the same collision resulted in the loss of the libellant's boat and cargo. On the contrary, the averments are, that each boat was guilty of a separate act of collision, each of which was sufficiently violent to have caused the sinking of the libellant's boat and cargo. These collisions were committed not only by each boat separately, but the injury by each was on a different part of the keel boat, and though near together in point of time, were not simultaneous. It is thus evident that the owners of the

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two boats might find it necessary to resort to different lines of defense in resisting the claim of the libellant, and to rely on different evidence for this purpose. The interests of each boat might therefore be brought into direct conflict and confusion, and inconvenience arise, not only in the final hearing, but in the preparation of the case for trial. There certainly is no necessity for this, as it is the undoubted right of the libellant to proceed in a separate action against each of the boats. To avoid any injury that might possibly result from such a course, it would perhaps be the duty of the court in the exercise of its discretion, to see that no decree should be entered in either case, until both should be heard. Thus, if the libellant by his evidence shall prove a case of fault and consequent liability, as to one or both the boats charged with fault, damages may be decreed on such principles as shall meet the justice of the case.

If the libellant, by amendment, can allege a state of facts showing such concert and privity between the two steamboats, as will create a joint liability, within the principles stated by the court, he can have permission to do so; otherwise, the libel must be dismissed, and the proceeding commenced *de novo*.

(CIRCUIT COURT.)

JONAS DRURY AND LAVINIA DRURY, HIS WIFE, v. JOHN EWING
AND SARAH C. EWING, HIS WIFE, ET AL.

On a motion for an attachment for a contempt in violating an injunction, the original decree can not be impeached, except for fraud, or defect of jurisdiction in the court, as to the subject matter of the suit.

The chart copyrighted to the complainant's wife, as published on a single sheet, containing diagrams representing a system of taking measures for, and cutting ladies' dresses, with instructions for its practical use, is a book within the meaning of the first section of the act of Congress of February 8, 1831, and is entitled to the protection of the statute.

In deciding whether a publication is an infringement of one for which a

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previous copyright had been obtained, the true inquiry is, whether the work alleged to be a piracy is substantially the same as that copyrighted; and mere colorable variations intended to evade liability for an infringement, will not destroy the legal identity of the two.

If a material part of the copyrighted publication is used, though the alleged piratical work may be in some respects an improvement, it is still an infringement of the exclusive right of the author.

The substantial identity of the system of the defendant's wife with that copyrighted by the complainant being established by the evidence, the former is adjudged guilty of a violation of the injunction in using and selling her guide, and is ordered to surrender all the copies in her possession or within her control, as also the plate on which it is printed, to the clerk of this court, within twenty days, and to pay the costs of this proceeding.

Lincoln, Smith & Warnock, for complainants.

A. J. Pruden, for defendants.

OPINION OF THE COURT:

The bill in this case was filed June 28, 1860. The complainants aver that the said Lavinia Drury is the " authoress and proprietress " of a chart entitled, " The ladies' chart for cutting dresses and basques for ladies, and coats, jackets, etc., for boys," a copy of which was duly deposited in the office of the clerk of the District Court of the United States for the Southern District of Ohio, April 25, 1859, by which the exclusive right of publishing, using, and vending the same was secured to her, by the act of Congress on that subject, for the period of twenty-eight years. The bill further alleges that the said Sarah C. Ewing, in conjunction with her husband and others, has caused to be published and sold a large number of said charts, and was then publishing and selling the same, without any license or authority from the said Jonas and Lavinia Drury, and in violation of their rights and greatly to their injury. The bill prays for an injunction to restrain the defendants from any further publication of said charts, and for other relief. A provisional injunction in accordance with the prayer of the bill was ordered July 2, 1860.

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The answer of Ewing and wife was filed September 3, 1860. The answer admits, in substance, the sale of Mrs. Drury's charts, but alleges they were sold or used under an arrangement between the parties, by which Mrs. Ewing was constituted the agent of Mrs. Drury, and as such was authorized to vend and use the charts. And the defendants deny that they have in any way infringed the exclusive right of the complainants by such sale and use.

The case came on for hearing on the bill, answer, exhibits, and proofs, January 21, 1861, and resulted in a decree for the complainants, and the award of a perpetual injunction against the defendants.

On May 10, 1862, upon a proper showing by the complainants, a rule was entered against Ewing and wife, requiring them to show cause why they should not be attached as for a contempt in violating the injunction. This rule was duly served, and the defendants, Ewing and wife, appeared and in response thereto filed an answer denying that they had violated the injunction, or had intentionally disregarded the order of the court, and praying to be discharged from the rule. In the progress of the investigation growing out of the motion for an attachment, it was made to appear that in September, 1860, Ewing and wife had deposited, in the office of the clerk of the District Court of the United States for the Eastern District of Missouri, a copy of what is described as "the ladies' guide" for taking the measures and cutting garments for females, of which Mrs. Ewing claimed to be the authoress or inventress, and for which she had thus secured a valid copyright. It was also proved on such hearing, and not controverted by the defendants, that Mrs. Ewing had printed a large edition of her guide, and that she had sold many copies of the same after the service of the injunction upon the defendants. In resisting the application for an attachment, it was assumed by the counsel of the Ewings, that the guide which they had copyrighted in Missouri was substantially different from Mrs. Drury's, and that the use

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and sale of them did not therefore involve a violation of the injunction or any infringement of her rights. This posture of the application for an attachment presented the question of the identity of Mrs. Drury's chart and Mrs. Ewing's guide. And, upon this issue, a great mass of testimony has been taken by these parties, and, after a protracted hearing and very elaborate arguments, the question has been submitted for the action of the court.

In this connection, it should be stated, that in addition to the issue of identity if the court should adjudge it to be established by the testimony, it is strenuously urged by counsel that the motion for an attachment can not be entertained, and the Ewings held to be guilty of a contempt, for the reason that the copyright of Mrs. Drury is a nullity as not being a legitimate subject of a copyright within the scope and intention of the act of Congress.

This point first claims the attention of the court. And in relation to it, it is obvious to remark, that whatever ground there may have been for contesting the validity of the copyright on the hearing of the original case, it is now too late to do so. The defendants are clearly concluded by the admissions of their answer, and by the facts adjudged true by the decree of the court, and which could properly have been contested at the hearing on the merits. The bill, as before noticed, contains the distinct averment that Mrs. Drury is the authoress and proprietress of the chart copyrighted to her, and that the exclusive right to publish, use, and vend the same vested in her. These allegations are not controverted or put in issue by the answer. They are, at least by the strongest implication, admitted to be true. The answer does not allege the invalidity of Mrs. Drury's copyright, either on the ground that it is not within the act of Congress, or that it was not her original invention. Indeed, these points are conceded in the answer, as in that, the Ewings rest their vindication of the sales of the charts up to that time, on the ground that Mrs. Ewing was the agent of Mrs. Drury. This is wholly inconsistent with the

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position now taken, that her copyrighted charter is a nullity in law. This point not having been brought to the notice of the court at the hearing, it was clearly not its duty, *sua sponte*, to pass upon it, even if there had been doubts as to the validity of the copyright. The court therefore found the facts alleged in the bill to be sufficiently verified, and entered a decree to that effect. The decree assumes that Mrs. Drury's copyright was valid, and that she was entitled to protection against its infringement. It also finds that the defendants had so violated that right as to justify an order for an injunction, and the award of damages in favor of the complainants in accordance with the statute.

In this state of the case no proposition can be clearer than that the defendants, upon the pending motion, can not impeach the decree thus entered. Several entire terms of the court have intervened since its entry, and it would be an unheard of exercise of jurisdiction, in this collateral way, to revise and reverse it. No court will do this in a proceeding looking only to the enforcement of the decree, except on a clear showing of fraud in its rendition, or a want of jurisdiction as to the subject-matter of the suit. There is no pretense or allegation of fraud in the decree, nor is there a doubt of the jurisdiction of the court in the suit. This is given in such express terms by the statute, as to leave no room for controversy. If there was any error in the facts found by the decree, or the legal conclusions of the court, the obvious and only remedy was an appeal to a higher court having ample power to revise and reverse the decree. This principle is so well settled as scarcely to need the citation of authorities for its support. It has been repeatedly affirmed by this court, and distinctly held by the Supreme Court of the United States. 10 Pet. 474; 14 How. 588.

But it is by no means clear that the objection now urged to the validity of the complainant's copyright could have been sustained, if it had been presented in the proper way

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and at the proper time. The point made by the defendant's counsel is, that the chart copyrighted to Mrs. Drury is neither a *book*, nor a *chart*, nor a *print*, within the terms of the act of Congress, and therefore not within its protection. Upon this point, no American authorities have been referred to, nor am I aware that it has been decided in this country. In the English courts I know of but one case in which it has been fully considered. This will be presently referred to as having a direct bearing on the question adverted to.

Section 1 of the act of Congress of February 3, 1881, 4 Statutes of the United States, 436, secures to the author of any *book* or *books*, map, chart, or musical composition, or to any one who shall invent, design, etch, engrave, work or cause to be engraved, etched, or worked from his own design, the exclusive right of printing, reprinting, publishing, and vending the same for the term of twenty-eight years, by complying with certain requirements of the statute. The question presented is, whether the chart for which Mrs. Drury has procured a copyright under the statute falls within any of the foregoing designations. I do not propose to consider this question at any length. As a first impression, from an inspection of the chart, the mind repudiates the conclusion that it is a *book*; and when the point was first suggested, it occurred to me it would require a forced construction of the statute to bring it fairly within the meaning of that term. The chart as printed and published for use is contained on one large sheet, representing a series of diagrams, interspersed with printed instructions as to the mode of using them in taking measurements for and cutting certain parts of ladies' dresses. As necessary to the practical use of the diagrams, they are pasted on thick paper or pasteboard, corresponding with and showing precisely the forms of the diagrams. The exact dimension and form of every part of the garment intended to be cut is indicated by a series of numerals placed along the outer edges of the diagrams thus

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arranged, and by means of dots or marks at the proper figures, the exact size and course of each section of the garment is ascertained with mathematical precision.

Now, it may well be conceded, that the chart as printed on the sheet, or as pasted in parts for practical use, is not a *book*, according to the more popular sense of the word. But, in giving effect to the statute according to its obvious design and spirit, I can see no necessity for restricting the word to a volume. The origin and derivation of the word *book* does not justify this restricted sense. Without intending to make any show of learning on this subject, or attempting a critical investigation, I may remark what is well known, that the Latin word *liber*—book—had no reference to the collection of writings in a volume, but primarily signifies the bark of a tree. Webster, in his dictionary, says our word *book* is derived from the Saxon, *boc*, meaning a beech-tree; and in other languages of the north of Europe, it has the same derivation. The supposition is, that either the bark of the beech, or what is more probable, thin polished plates of the wood of that tree, were used for writing. It is a fact well established that the Chinese, before the discovery of the art of making paper, used the latter mode for that purpose. It is also well known to readers of the Bible and other ancient writings that in referring to books the collection of literary materials in a volume is not intended. The *papyrus* was first used for writing, and at a later period the skins of animals made into parchments; but they are called books, though the manuscripts were in the form of rolls or loose leaves, unbound, and not in volumes according to the modern sense of the term.

But I should certainly have hesitated in adopting this view as a judicial conclusion, if it was not sustained by an authority entitled to high respect. The English courts, after the fullest investigation, have decided this question in a case to which I will now refer. The statute of 8 Anne, on the subject of copyrights, enumerating in section 1 the

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works intended to be protected by it, contains the words *book or books* precisely as in our statute. In the case of *Clementi v. Golding*, 2 Campb. 25, the court held that the form of the publication was not material in determining whether it was or was not a book, within the meaning of the statute. That was a suit for a piracy in reprinting and selling a song, which had been published on a *single sheet*, and in that form copyrighted. The objection was made, that it was not a *book* entitled to the protection of the statute. Lord Ellenborough, contrary to his opinion in a previous case, overruled the objection and directed the jury to return a verdict for the plaintiff, with leave to move for a new trial. He is reported to have said: "I do not see at present why a composition printed on a single sheet of paper should not be entitled to the privileges of the statute." He adds: "I was at first startled at a single sheet of paper being called a *book*, but I was afterward disposed to think it might be so considered within the meaning of the act of parliament, and when the matter came before the court, the other judges inclined to the same opinion." After the argument of the motion for a new trial, the reporter adds: "The judges seemed unanimously of opinion that it could not depend on the form of the publication, whether it were entitled to the privileges of the statute or not; that a composition on a single sheet might well be a *book* within the meaning of the legislature, and that the verdict of the jury ought not to be disturbed." See same case, 11 East, 244 (new ed. vol. 6, 125); also case of *Hime v. Dale*, decided in 1803, referred to 2 Camp. 27; Curtis on Copyrights, 105, *et seq.*; 2 Wat.; Eden on Injunc. 822.

It will be seen by reference to the case of *Clementi v. Golding*, that the question was very fully and carefully considered by the full court. No case has been referred to, and I am not aware there is any in which the doctrine then settled has been reconsidered or overruled by the English courts. And the construction of the statute of

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Anne, on the point under consideration, may be regarded as law in England. And I can not perceive on what ground the principle can be impugned as against good sense and reason. I am, therefore, inclined to adopt the liberal construction given by the English courts to their statute, and to hold that Mrs. Drury's chart is within the protection of our statute. She could doubtless have given it to the world in a succession of sheets, bound together and constituting a volume, but it is obvious that the chart for practical purposes is more easily understood, and therefore more useful, printed on a single sheet large enough to exhibit all the diagrams at one view. I can not perceive why her rights as an authoress or inventress should be prejudiced by this form of publication. If the chart, as the court is bound, for reasons before intimated, to presume, is original with her—the product of thought and mental toil—her claims is by no means destitute of merit, and she is justly entitled to all the benefits which the law confers. It is clearly no objection to the validity of her copyright, that her production does not claim a standing as a work of great literary merit. The statute does not make this a necessary element of a legal copyright; and it is well known there are works of great practical utility, having no pretension to literary merit, which are yet within, not only the words, but the scope and design of the statute.

Adopting this view of the law, it is not necessary to decide whether Mrs. Drury's copyright can be sustained as a *chart* or *print*. These words are used in the statute as legitimate subjects of a copyright, and it would not imply a very forced construction to hold that the copyrighted work of Mrs. Drury is included in one or both of these terms. The authorities, I think, would fully sustain such a conclusion.

The only question which remains is, whether the complainant's chart and Mrs. Ewing's guide are legally identical. If they are so, it follows necessarily that the use and sale of the latter is an infringement of Mrs. Drury's exclusive right and a violation of the injunction. And here the

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true inquiry undoubtedly is, not whether the one is a fac simile of the other, but whether there is such a substantial identity as fairly to justify the inference that in getting up the guide, Mrs. Ewing has availed herself of Mrs. Drury's chart and has borrowed from it its essential characteristics. And the decision of this question is in no way affected by the fact—if conceded to be the fact—that the guide is in some respects an improvement of and of superior utility to the chart of the complainants. This would confer no right to appropriate and use the prior invention or discovery of Mrs. Drury. The law on this subject is stated by Judge McLean, 4 McLean, 308, as follows: "The same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts on the same principle, however its structure may be varied, is an infringement of the patent. The second machine may be recommended by its simplicity and cheapness, still if it act on the same principle of the one first patented, the patent is violated." And in the same case, the learned judge asserts the principle strongly, that in the case of a copyright, if the work alleged to be a piracy is of a character to render the original "less valuable by superseding its use in any degree, the right of the author is infringed."

In the case of *Folsom v. Marsh*, 2 Story, 115, it is decided that it is "not necessary to constitute an evasion of a copyright, that the whole of a work should be copied, or even a large portion of it, in form or substance. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author substantially, to an injurious extent, appropriated by another, that is sufficient in point of law to constitute a piracy *pro tanto*. The entirety of the copyright is the property of the author, and it is no defense that another has appropriated a part, and not the whole of any property." To the same effect are the views of Judge Story, in the case of *Emerson v. Davies*, 3 Story, 795. He says: "To amount to an infringement, it is not necessary that there should be a complete copy or imitation

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in use throughout, but only that there should be an important and valuable portion, which operates injuriously to the copyright of the plaintiff." In the same case the learned judge, in defining a piracy of a copyright, after a reference to the English authorities, says: "I think it may be laid down as the clear result of the authorities in cases of this nature, that the true test of piracy or not, is to ascertain whether the defendant has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with *colorable* alterations and variations only, to disguise the use thereof."

Judge Woodbury, on this point says, the true inquiry in these cases is, "Whether the book of the defendant, taken as a whole, is substantially a copy of the plaintiff's; whether it has virtually the same plan and character throughout, and is intended to supersede the other in the market with the same class of readers and purchasers by introducing no considerable new matter, or little or nothing new except colorable deviations." *Webb v. Powers*, 2 Wood. & Minot, 514. To the same effect are the numerous English decisions on this point. 2 Mylne & C. 740; 30 Eng. L. & E. 461; 36 Ibid. 321.

These authorities seem to be decisive of the point under consideration. And the single inquiry in this case therefore is, whether there is a substantial identity as between the chart copyrighted to Mrs. Drury and the guide used and sold by Mrs. Ewing. On this issue, I shall not attempt a critical notice of the mass of testimony introduced on the hearing of the present motion. It is to be regretted that under the impulse of their heated passions and intemperate zeal, these excited females have put themselves to unnecessary trouble and expense in taking depositions on the question of identity. It lies within narrow limits and presents no great difficulty in its solution. It is to be borne in mind that Mrs. Ewing does not allege, and has not proved, that she is the inventress or authoress of the system copyrighted to her; nor does she deny in her original answer,

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nor does she now deny, that Mrs. Drury's chart is the basis of her guide. Her claim is simply that she has so far varied from and improved the chart as to constitute her guide an original work, and that, therefore, it is no infringement. But it is obvious from inspection that the two embody substantially, if not literally, the same principle. The diagrams in each are essentially the same in form, dimensions, etc., and have the same arrangement of numerals. It is true, the different scales or rules for taking measurements are designated by names differing in the guide from those used in the chart, but this does not destroy the identity of the two. In practice they produce the same curves or forms for the same identical purpose. The device of Mrs. Ewing in placing on what she calls the back scale one number higher than on the front scale, thus making a seeming difference between her plan and that of Mrs. Drury's, can not affect the question of legal identity. This clearly involves no change of principle. And the same remark applies to the claim of a want of identity, on the ground that Mrs. Ewing's plan as alleged, requires five measurements, whereas Mrs. Drury provides for three only. The mere increase of the number of measurements does not constitute an essential difference in the two plans. But it is by no means clear, that Mrs. Ewing, in her system as copyrighted, requires more than the three measurements. The weight of evidence well justifies the conclusion that until this controversy arose, in practice three only were used, and that the subsequent addition of the two measurements, was an afterthought resorted to for an obvious purpose.

But there is one fact that seems wholly conclusive on this question of identity, and dispenses with the necessity of a minute inquiry into the alleged discrepancies between the two plans. Some nine or ten witnesses, practical and intelligent dressmakers, well acquainted with the theory and practice of taking measurements, and cutting dresses upon the plan of these parties, testify that the two are substantially the same, and in practice produce the same result.

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Some of these witnesses swear they have cut dresses by both plans, and that when the directions of each are strictly pursued, the results are substantially the same. One witness with great apparent candor and intelligence states, that by an actual experiment with the two plans, when he dropped the surplus number on the back scale of Mrs. Ewing, the measurements were precisely identical, and that when that number was used there was but a trifling difference. Such an experiment affords an unerring test of truth, and if the witness is credible, the force of the fact stated by him can not be overcome by the speculative opinions of any number of witnesses testifying adversely to him.

Without noticing other material discrepancies between the chart of Mrs. Drury and Mrs. Ewing's guide, I am led to the conclusion that they are essentially the same, within the scope of the authorities to which I have referred. Mrs. Ewing has, with some adroitness, so arranged and transposed some parts of Mrs. Drury's diagrams as to present to the unexperienced eye the impression that they are dissimilar, but in doing this she has utterly failed to prove that there is any difference in the principle of the two. There is, also, a substantial identity between the printed directions and instructions accompanying the chart and the guide. True, the words and sentences used by Mr. Ewing are not the same as those used by Mr. Drury, but they are of the same import, and intended for the same purpose. In this remark, I do not forget that it is strenuously urged by the counsel for the complainants that what is designated by Mrs. Ewing as her third pupil's instruction is more full and minute than those connected with the chart, and so far unlike them. It is enough to say, in reference to this, that the evidence fully warrants the conclusion that these constituted no part of the rules or instructions as claimed by Mrs. Ewing, and copyrighted to her in Missouri. They have been appended recently with the obvious purpose of negating the identity of the two plans. It is another evidence of the consciousness of Mrs. Ewing, that some-

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thing was needed to avoid the otherwise inevitable conclusion, that in getting up her guide she was interfering with and pirating on the prior exclusive right of Mrs. Drury. It can not be doubted that she has adopted all the essential parts of Mrs. Drury's system, and that so far as there are any apparent alterations they are colorable and evasive. It must be conceded that Mrs. Ewing's course does not commend her to the favorable consideration of a court of equity. She seems to have taken a dishonorable advantage of her position as the agent of Mrs. Drury, with the expectation of pecuniary benefits, to which she was neither morally nor legally entitled. Her intelligence and adroitness, as developed throughout this controversy, repel the inference that she acted in ignorance of the fact that she was invading the just rights of the complainants. And when by the decree of this court an injunction was granted to restrain her from the further sale and use of her guide, it was a duty of which she could not have been ignorant, to respect and obey it. She has willfully violated the injunction, and the complainants, as they had a right to do, have asked for and obtained a rule to show cause why she should not be dealt with as for a contempt of court. No sufficient showing against such a judgment has been made, and I can not do otherwise than find her guilty of the alleged contempt.

The only embarrassment on the part of the court arises from the difficulty of determining what order shall now be made in the case. It is necessary that the supremacy of the law should be vindicated, and the rights of the complainants protected as far as practicable. To this end, it is unquestionably competent for the court to order the imprisonment of Mrs. Ewing, as a punishment for the contempt. But in the case of a female, I am exceedingly reluctant to make such an order. And if any assurance can be given that there will be no repetition of the offense, and that the rights of the complainants will hereafter be respected, I will not now adopt that stringent course. For

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the present, with the intimation that such future action, as circumstances may require, will be taken by the court, it is now ordered that the defendants, Ewing and his wife, surrender to the clerk of this court, within twenty days, all the published copies of the guide in their possession, or within their control, together with the plate or plates on which they are printed; and also that within that time they pay the costs of this proceeding.

(CIRCUIT COURT.)

JOHN CRABTREE v. EXECUTORS OF WM. NEFF.

Where a judgment was entered for a plaintiff, with costs, the court will not, at a subsequent term, revise or correct it as to the costs; though being for less than \$500, the plaintiff was not entitled to such judgment.

A retaxation will not be ordered, on the ground that the clerk has not discriminated between the costs of the plaintiff and those of the defendant.

The practice of taxing the entire cost to the losing party, without discrimination, has always prevailed in this court; and, until otherwise provided by law or obligatory rule of court, will not be changed. It is, prescriptively, at least, the law of this court.

R. M. Corwine, for plaintiff.

M. H. Tilden, for defendants.

OPINION OF THE COURT:

This is a motion by the defendants to retax the costs, or in effect to vacate a judgment as to costs, rendered by this court several terms since. The jury, on the trial of the case, returned a verdict in favor of the plaintiff for less than five hundred dollars, and a judgment, including costs, was entered against the defendants.

There is no doubt that the judgment against the defendants for costs was erroneous. It was entered inadvertently, and without being noticed by the counsel. The statute is explicit in providing that a judgment for less than five

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hundred dollars shall not carry costs. And if, at the term at which the judgment was entered, a motion had been made to vacate or amend it, as to the costs, it would have been so ordered.

The question now is, whether, after several terms of the court have intervened since the judgment was entered, it is competent for the court to revise or amend it. There can be no doubt that the judgment, awarding costs to the plaintiff, is a substantial part of the judgment in the case. It has the same legal effect as the judgment on the verdict for the sum returned by the jury.

In the case of the *Bank of the United States v. Moss et al.*, 6 Howard, 31, the Supreme Court decided that a court can not revise or correct a judgment entered at a prior term, even where the court rendering the judgment had not jurisdiction of the case. This doctrine has been recognized and affirmed by repeated decisions of that court, and is the settled law, not only in the courts of the United States, but in the courts of the States, with perhaps one exception.

But there is another ground on which it is insisted the motion for a retaxation of the costs must be sustained. It is objected to the taxation that it does not discriminate between what are properly the costs of the plaintiff and the defendants' costs. While the theory of taxation contended for by counsel, as sanctioned by the common law, is correct, there is no statute, or rule of court, making it imperative on the court. The practice of taxing the entire cost of the case to the losing party, has prevailed in this court from its organization, unless the judgment provides specially for an apportionment of the costs between the parties. This may now be regarded, prescriptively at least, as the law of this court. It would be attended with great inconvenience now to change a practice so long and so uniformly adopted. Nothing short of direct legislation on the subject, or some rule obligatory on the court, would justify the change.

The motion for retaxation is overruled.

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(CIRCUIT COURT.)

THE UNITED STATES v. CHARLES W. H. CATHCART.

SAME v. CATHERINE PARMENTER.

The seceding ordinances of a portion of the States did not abrogate the constitution of the United States, or release the citizens of any State from their obligation of loyalty to the government of the United States, and a citizen or resident of any State may, therefore, be indicted and punished for treasonable acts against that government.

The government of the United States is not a compact between the several States, from which any State may withdraw at pleasure, with or without cause.

The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but, as the preamble emphatically declares, by the *people* of the United States; and the government of the Union emanates from the people, and is a government for the people.

The government of the Union, though limited in its powers, is supreme within its sphere of action, and laws passed pursuant to the constitution, form the supreme law of the land.

Flamen Ball, District Attorney, for United States.

William M. Corry, for defendants.

OPINION OF THE COURT:

In the first of these cases, a special demurrer to the indictment has been filed; and in the second, there is a motion to quash. The indictments in both cases are substantially the same in their structure; and the questions raised on the demurrer, and in the motion to quash, being the same, it will be unnecessary to consider them separately, as the judgment in one case will be decisive of the other. The

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views now stated by the court have special reference to the grounds of demurrer in Cathcart's case.

The indictment contains two counts. The first count avers that there is now existing an open and public war or rebellion, carried on with force and arms by the so-called Confederate States of America, against the government and laws of the United States; and that the defendant, owing allegiance to the government of the United States, in violation of such allegiance has levied war against the same by banding together with others in military array; and thus has committed treason against the United States.

The second count, after reciting the existence of the rebellion or war, as averred in the first count, charges that the defendant knowingly and willfully conspired with others, and did assist and give aid and comfort to those in rebellion or war against the United States, and in the execution of his traitorous adhesion to the enemies of the United States, committed several overt acts of treason, which are specifically set forth, but which it is unnecessary here to recite.

The first count is based on the first section of the act of Congress of July 17, 1862, to suppress insurrection, punish treason, etc., which provides that every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, or fine and imprisonment, as the court may direct.

The second count is based on section 2 of said act, which declares "that if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid and comfort thereto, or shall engage in, or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, shall be liable to fine or imprisonment, or both, at the discretion of the court." 12 Laws of U. S. 589.

There are several exceptions to the indictment, which are set out in the special demurrer. The first one stated has been abandoned, and need not be noticed. The second

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exception is for duplicity in the second count in averring a conspiracy of several persons to aid in several distinct offenses. 3. Misjoinder of a count for felony, and for a misdemeanor. 4. No averment that the crimes charged were committed within any county in the Southern District of Ohio. 5. Repugnance in both counts in averring the crimes charged to have been committed against the government of the United States and also the people of the United States. 6. The crimes are charged to have been committed against the allegiance of the defendant, when they can only be against obedience, and because of the agreement of the State of Ohio, and of all the other States, to the constitutional compact binding on the citizens of Ohio and of each State, so long as the compact remained. 7. That treason or conspiracy against the United States after the refusal of some of the States to continue the constitutional compact, are no longer possible.

[It would occupy too much space to insert the views of the court on the mere technical exceptions to the indictment, and they are therefore omitted.—REPORTER.]

The sixth and seventh causes of demurrer, involved also in the motion to quash, are yet to be considered. They have been recited as set out in the demurrer, in a previous part of this opinion, and it is not necessary to restate them here. Both present substantially the same question, and may, therefore, be discussed together. They affirm, that from the facts alleged in the indictment, it is impossible that the crime of treason against the government of the United States can be committed. In a legal sense, the demurrer admits the truth of the facts alleged in the indictment. One of these facts is, that the United States is now engaged in a war for the suppression of a rebellion against the government by the people of certain States, aiming at the overthrow of the constitution and the establishment of another government. It is insisted that the States in rebellion have abrogated the compact by which they were bound to the Union, and that this compact being dissolved, by

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their ordinances of secession, neither a citizen of one of the States thus seceding, nor of any State not involved in the acts of secession, can commit the crime of treason against the government of the United States.

In support of this position, certainly somewhat startling in its character, it is insisted that the constitution, instead of creating an actual and efficient government for the whole people of the United States, is a mere league or compact, from which any State, or any number of States, may at any time withdraw, with or without cause, and without or against the consent of the people of the other States, as caprice, passion, or interest may dictate; that the States, when they entered into the Union and became parties to this league or compact, were sovereign and independent; that the allegiance of the people of each State was due exclusively to the State in which the citizen had his domicile, and the allegiance being inalienable and indivisible, could not be and has not been transferred, in whole or in part, to the government of the United States, and remains, therefore, with the people of the individual States, whose obligations of allegiance are wholly due to the State in which they live; that when the people of a State, in any way they may see proper to prescribe, ignore, or repudiate such league or compact, they are thereby absolved from all obligation of obedience or allegiance to the government of the United States; and that, if they take the attitude of armed rebellion against it, with the avowed purpose of its overthrow, they can not be punished as rebels or traitors. And as the necessary and logical result of this theory, it is urged that if a citizen or resident of a State, which has not seceded, but which remains faithful and loyal to the government, adheres to those thus in rebellion, and supports and sustains them in their criminal attempts, he is not guilty of treason and can not be held accountable for that crime, under the laws or authority of the United States.

These are in substance the points made by counsel in support of the two last grounds of demurrer. The argu-

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ment has been greatly extended, and the domain of political metaphysics has been fully explored in its progress. I have listened patiently to the statement of the views of counsel, though not without some surprise that they should have been urged with such apparent gravity and earnestness, before this court, on a purely legal question, with the full knowledge that they were in direct conflict with the solemn and well-considered adjudications of the Supreme Court of the United States, and the views of numerous elementary writers of the highest reputation as jurists. I am at a loss to comprehend on what grounds counsel could have supposed this court would sustain a theory so entirely at variance, not only with the decisive authorities to which I shall refer, but with the uniform action of every department of the general government from its organization to the present day. It is obvious that the counsel throughout his argument has addressed himself to the question, what, in his judgment, the structure of our government should have been, and not what it is. It seemed, therefore, to the court, that however appropriate the peculiar views of counsel may have been, if urged in a popular assembly to rectify a supposed erroneous public sentiment, or in a convention to amend the constitution, or reconstruct the government, they were wholly out of place on the question, whether the averments and structure of the indictment in this case, were sufficient in law to put the defendant on trial before a traverse jury. The manner of counsel was, however, unexceptionably courteous, and his views were presented with seeming earnestness and sincerity. It is due, therefore, to the occasion, and to the position I occupy, that I should state some of the reasons why I can not assent to the principles he has urged upon the attention of the court. And, in the first place, I will refer to some of the adjudicated cases in which these principles have been discussed and settled by men whose intellectual power and profound knowledge of the structure of our government, entitle them to the highest measure of respect and veneration. And I may

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remark here, that in so far as these principles are embodied and propounded in the judicial decisions of the Supreme Court, they are positively authoritative on this court, as a subordinate court of the United States.

In the case of *Martin v. Hunter's Lessee*, 1 Wheaton, 304, (3 Peters' Cond. R. 575), the Supreme Court says: "The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the *people* of the United States. There can be no doubt that it was competent to the people to invest the general government with all the powers, which they might deem proper and necessary, to extend or restrain those powers according to their own good pleasure, and to give them *paramount and supreme authority*." The opinion of the court in this case was delivered by Justice Story, and was concurred in by the whole court, including Chief Justice Marshall.

In *McCulloch v. The State of Maryland*, 4 Wheaton, 316, Chief Justice Marshall delivering the opinion of the court, it is decided "that the government of the Union is a government of the people; it emanates from them; its powers are granted by them, and are to be exercised directly on them, and for their benefit." Again: "The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the *supreme law of the land*."

Judge Story, in discussing the question whether the constitution of the United States is a compact between the several States, remarks that "there is nowhere found upon the face of the constitution any clause intimating it to be a compact, or in any wise providing for its interpretation as such. On the contrary, the preamble emphatically speaks of it as a solemn ordinance and establishment of government. The language is: "*We, the people of the United States, do ordain and establish this Constitution for the United States of America*." Com. on the Constitution (Abr. ed.), 117. And again, page 119, the learned author says: "But

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that which would seem conclusive on the subject is the very language of the constitution itself. This constitution, says the sixth article, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." And he adds: "If it is the supreme law, how can the people of any State, either by any form of its own constitution or laws, or other proceedings, repeal, abrogate, or suspend it?" And again he says: "This of itself imports legal obligation, *permanence* and uncontrollability by any but the authorities authorized to alter or abolish it." And again, on this subject, the learned writer says, page 684: "It would be a perfect solecism to affirm that a national government should exist with certain powers, and yet in the exercise of those powers should not be supreme."

I will add to these references a brief notice of the case of *Ableman v. Booth*, 21 Howard, 506, decided by the Supreme Court of the United States in 1858, which sustains fully the general doctrines affirmed by the prior decisions of that court. I make this reference with the more satisfaction because the opinion was written and delivered by Chief Justice Taney, a judge eminent for his profound legal learning, and who has never been charged with extreme liberality in construing the constitution of the United States, and defining the powers of the general government. In that case, a judge of a State court in Wisconsin had discharged a party on *habeas corpus* who was in custody under the authority of the United States. The Supreme Court of the State sustained the action of the lower judge; and the case was removed to the Supreme Court of the United States by writ of error, in accordance with section 25 of the judiciary act of 1789. I shall give but brief quotations from the opinion of the court, indicating their views on the subject under consideration. On page 516, the court say: "Although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that

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sovereignty is *limited* and *restricted* by the constitution of the United States. And the powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." Again, on page 517, the court say: "The constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be obtained there would be little danger from abroad; and, to accomplish this purpose, it was felt by the statesmen who framed the constitution, and by the *people who adopted it*, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the general government; and that in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State, or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established." And the court further say: "The language of the constitution by which this power is granted is too plain to admit of doubt, or to need comment. It declares that 'this constitution, and the laws which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.'" On page 524, the court further say: "Nor is there anything in the supremacy of the general government, or the jurisdiction of its tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty.

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Neither this government nor the powers of which we are speaking were forced upon the States. The constitution of the United States, with all the powers conferred on it by the general government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another." And they add, page 525: "Now it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among the first and highest duties as a citizen, because free government can not exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. And certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes."

A still more recent decision of the Supreme Court, in the prize cases, as they are called, 1 Black, 685, strongly affirms the doctrines previously declared by that court. In the very able and lucid opinion of Mr. Justice Grier, giving the views of the court, page 678, he says: "Under the very peculiar constitution of this government, although the citizens owe *supreme* allegiance to the federal government, they owe also a *qualified* allegiance to the State in which they are domiciled."

And it may be proper here to remark that the principles enunciated in the case just referred to, are pertinent to the questions before this court on this demurrer in another aspect. The argument of the counsel for the demurrant is, that a citizen of a State can not be guilty of treason against the United States by adhering to, or giving aid and comfort to those now in rebellion against the government, because it is a mere insurrection or civil war, waged by the seceding

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States against the government. But in the prize cases the doctrine is very impressively announced that the rebellion has all the attributes of a foreign or public war, and that all the duties, obligations, disabilities, and penalties incident to such a war attach to every citizen. In a word, that those who are *particeps criminis* in the rebellion are not the less *traitors* because they are *rebels*.

In that case the court say: "It (the law of nations) contains no such anomalous doctrine as that which the court are now for the first time desired to pronounce—to wit: that insurgents who have risen against their sovereign, expelled her courts, established a revolutionary government, organized armies and commenced hostilities, are not *enemies* because they are *traitors*; and a war levied on the government by traitors in order to dismember and destroy it, is not *war*, because it is an insurrection." And again the court say: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice can not be kept open, *civil war* exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land." And further on in the opinion, as descriptive of the true character of the present rebellion, the court say: "It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force; south of this line is enemies' territory, because it is held in possession by an organized, hostile, and belligerent power."

Such are some of the deliverances of the highest judicial tribunal of the Union. They repudiate emphatically the mischievous heresy that the union of the States under the constitution is a mere league or compact, from which a State, or any number of States, may withdraw at pleasure, not only without the consent of the other States, but against their will. They deny the assumption that full and unqualified sovereignty still remains in the States or the

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people of a State, and affirm, on the contrary, that, by express words of the constitution, solemnly ratified by the people of the United States, the national government is supreme within the range of the powers delegated to it; while the States are sovereign only in the sense that they have an indisputable claim to the exercise of all the rights and powers guarantied to them by the constitution of the United States, or which are expressly or by fair implication reserved to them.

I might, perhaps, close this opinion here. But the course of the learned counsel in his argument seems to justify, if it does not call for some additional views. And the first remark is, that apart from the light which the high judicial authorities to which I have referred has thrown on the subject under discussion, I should have arrived at the same conclusions which they announce. It is my strong conviction that the language of the constitution, in connection with the known history of its origin, formation, and adoption, leaves no room for a doubt as to the character and structure of the government which it created. Its history is well authenticated, and bears upon every page the indelible stamp of truth. I can not, on an occasion like this, refer to or adduce the many facts which throw light upon the views and intentions of the eminent patriots and statesmen to whom we are indebted for our inimitable constitution. One thing is certain, the American people are in no danger of estimating their services too highly, or according to their memories a measure of honor which is not justly their due. With the illustrious Washington at their head, they entered upon the arduous duty of reconstructing the government under circumstances of deep depression and gloom. The confederation under which the Union had for some time existed, had proved a lamentable failure, and was on the verge of dissolution from its own inherent weakness. The hearts of the patriots who had toiled and bled in the revolutionary struggle for national liberty and independence, were stirred to their inmost depths, from an apprehen-

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sion that their great achievements would prove fruitless of the results which they had anticipated. They felt deeply the truth that, in framing a new structure of government, they must avoid the rock on which the old one had foundered, and must, above all things, incorporate an element of power to bind the States in an *indissoluble* national union. This is plainly indicated in the preamble, which declares as one of the objects of the constitution, the formation of "a more perfect Union," and is apparent not only from the debates in the convention, but from the language used throughout the entire instrument. After months of anxious toil and earnest deliberation, the present constitution was agreed to, and submitted to the people for their sanction and adoption. It was adopted by conventions in all the States, elected by the people for this purpose; and thus as the act of the people became the organic law. Its framers did not claim for it entire perfection; and contemplating the possibility that time would develop some necessary changes, wisely provided for its amendment by the same authority that had *ordained* and *established* it. It is not proposed to enter upon an extended discussion of the powers of the government, under the constitution thus framed and adopted. That it was designed to institute a government of the *people*, and for the *people* of the United States, and to confer upon it, within the powers granted or fairly implied, the attributes of sovereignty or supremacy, can not admit of a question. There is, in the language of the Supreme Court in a case before referred to, a *qualified* allegiance due to the State in which the citizen has his domicile, but it is subordinate to the allegiance due to the supreme government. The government, therefore, has a perfect right to exact, and has exacted from every one enjoying its protection, the duty of fidelity and allegiance. And it is certainly a fact, worthy of note, that there is not a word or phrase in the constitution of the United States which gives the least countenance to the theory that a State can obstruct or nullify the authority of the general government,

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exercised within its constitutional limits. Much less can the supreme folly of giving its sanction to the right of any State, or any number of States, to withdraw at will from the Union, be imputed to the constitution. Such a provision could not be viewed in any other light than as a solecism in the structure of a government. It would be substantially a provision for its own dissolution, without the sanction or agreement of the power which created it.

But I am not at liberty to extend this discussion. I may remark, in closing, that there were those in the convention which framed the constitution, and in the conventions of the States which ratified it, who objected to it because it created a national consolidated or supreme government of the United States. There was no difference of opinion then as to the character of the government which the constitution created, but the ground of its opponents was, that it did not conform to their views of what it should be. The counsel has referred in his argument to the resolutions of the legislatures of Virginia and Kentucky, passed in 1798, as giving sanction to the doctrine of the right of a State, at any time, to interpose its authority to prevent or provide a remedy for the unconstitutional exercise of authority on the part of the general government, and that they sanction what is called the right of nullification, or even of secession. I can not assent to the proposition that, properly understood, they justify such a conclusion. The history of these resolutions is well known to the American people. They were designed for a special political object, which was effected, in part at least, through their instrumentality. They affirmed that the States, being parties to the constitutional compact, "in case of a deliberate, palpable, and dangerous exercise of powers not granted by the compact, have a right, and are in duty bound to interpose to prevent the progress of the evil." A distinguished statesman has well observed, in commenting on these resolutions, that "the sort of interposition intended was left in studied obscurity." But Mr. Madison, who was the author

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of the resolutions adopted by the Virginia legislature, in his report to that body in 1799, asserts distinctly that no extra constitutional measures were intended. And thirty years later, during the administration of General Jackson, when certain prominent Southern politicians insisted that nullification was the proper remedy, in case of an invasion of the rights of a State, solemnly and earnestly protested against this construction of the Virginia resolutions. "He earnestly maintained that the separate action of an individual State was not contemplated by them, and that they had in view nothing but the concerted action of the States to procure a repeal of unconstitutional laws, or an amendment of the constitution." And in 1832, when Mr. Calhoun had succeeded in inducing South Carolina to pass an ordinance of nullification, on the avowed ground of the unconstitutionality of the laws imposing duties on imports, and that State was on the verge of open rebellion, the sturdy arm of Andrew Jackson was raised to crush it in the bud. Before resorting to force for this purpose, with a paternal anxiety for the people of that State who had been deluded by the false political teachings of their leaders, he issued his memorable proclamation, addressed to the people of that State. It is a document which well deserves to be cherished in the memories of the American people to the latest ages. It is alike remarkable for the earnest devotion of its author to the union of the States, the elevated patriotism which is exhibited in every line, and its able and unanswerable exposition of the true principles and theory of the government. The fallacies of the nullification party were held up as dangerous political heresies. Its effects upon the whole country were electrical. It was clothed with the power of truth, and carried conviction to the minds of all men of all political parties whose intellects were not so constructed as to be impervious to the voice of reason, or dead to the impulses of patriotism.

But though the iron will and sturdy sense of President Jackson had thoroughly rebuked and arrested the heresy

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for the time, the deadly poison was not wholly eradicated from the southern mind. After the lapse of thirty years, its baleful effects have appeared in a new and more malignant form. That which was nullification in 1832, is secession in 1860. The political leaders in the Southern States, by means which I do not care to recite, have so far succeeded in their treasonable machinations as to induce those States madly to leap into the fiery vortex of secession. They have gone through the mockery of passing ordinances, in which they declare they are no longer parties of the solemn compact of government, and repudiate all allegiance to it. They have inaugurated war against that government and have been in armed rebellion against it for nearly three years. If successful, the overthrow of the government is the inevitable result, for secession, having no warrant in the constitution, is *revolution*. The authorities charged with the solemn duty of preserving and perpetuating the government, have found it imperatively necessary to meet force by force, and have adopted measures to repel and subdue the criminal designs of those in rebellion. The country is in a state of war—a war which the adjudications of the Supreme Court have declared to be lawful and constitutional. A struggle is in progress which, at one time, jeopardized the very life of the government. In such a crisis, it is now gravely urged in a court deriving its being and authority from a constitution which the judges are sworn to support, that a citizen of the patriotic and loyal State of Ohio, charged with criminal complicity in the rebellion, can not be guilty of treason, because the revolted States had a right to withdraw from the Union ; and, as a logical and legal result, have virtually destroyed the entire fabric of the government, and absolved the people of the United States from all obligation of allegiance to it ! As a judge, and as a citizen of the United States, I am constrained to enter my protest against such a dangerous perversion of the principles of the constitution. To sanction such a position, under circumstances now existing in our

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country, implies, in my judgment, a most unenviable condition of intellect, and the possession of a measure of courage, physical and moral, to which I can lay no claim. The character and tendencies of this doctrine are not now to be settled by unmeaning abstractions and metaphysical speculations. The period when these could have been available has gone by, and the bitter fruits of this sad error are now fully developed in its practical results. It has plunged those who have been its deluded victims into one of the deadliest conflicts the world has ever witnessed. Its blighting influences are now frightfully apparent in the wide-spread suffering, desolation, and ruin, which it has brought upon the States which have so madly raised the banner of revolt. The loyal States, too, have laid liberal offerings on the altar of sacrifice. In their patriotic devotion to the government of their fathers, and impelled by a stern, unconquerable purpose of defending, preserving, and perpetuating it, they have cheerfully borne a severe trial of their energies, and profusely lavished their treasures and poured out their blood. The sacrifice, though costly, we may well hope, will be fully repaid by the end to be achieved.

I have now only to say, that upon none of the grounds urged, can the exceptions to this indictment be sustained. The demurrer, as also the motion to quash in the case of Catherine Parmenter, are therefore overruled.

(CIRCUIT COURT.)

THE UNITED STATES v. PATRICK TIERNEY.

Land rented to the United States, to be used temporarily as a camp, is not a *place*, within the terms of the constitution of the United States, over which the United States have "sole and exclusive jurisdiction."

Within such camp the jurisdiction of the United States would only be such

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as was necessary for military purposes and required for the enforcement of discipline and the execution of the rules and articles of war.

The United States possesses exclusive jurisdiction of places that have been *purchased* by the United States by consent of the legislature of the State, for the purpose of erecting a fort, magazine, arsenal, dock-yard, or other needful building.

The courts of the United States have no jurisdiction of an offense against section 16 of the act of Congress of 1790, committed in a place where the jurisdiction of the United States is concurrent with that of a State.

Flamen Ball, District Attorney, for United States.

John M. Staples, for defendant.

OPINION OF THE COURT:

The indictment against the defendant in this case, is based upon section 16 of crimes act of April 30, 1790, which provides, "that if any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away with intent to steal or purloin the personal goods of another," etc., shall be liable to the punishment prescribed. The charge against the defendant is the stealing of a mule at a place called Camp Hurtt, and the indictment alleges that it is "a military camp of the United States, the site of which said camp is within the sole and exclusive jurisdiction of the United States." The defendant has filed a plea to the jurisdiction. By agreement of counsel, the facts in reference to the right of exclusive jurisdiction in the United States over the said camp have been submitted to the court.

These facts are, in substance, that on March 19, 1863, by a written agreement between Timothy Kirby and Capt. Hurtt, assistant-quartermaster of the United States, Kirby leased to the United States a pasture-field containing about sixty acres of land for one month, with the privilege of using and occupying the same for six months, at the option of the government, at a stipulated rent.

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Was this field, alleged in the indictment to be within the limits of Camp Hurtt, a *place* within the sole and exclusive jurisdiction of the United States, so as to give this court jurisdiction of the larceny? The constitution of the United States, art. 1, sec. 8, authorizes Congress to exercise exclusive legislation "over all places purchased by consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Was the field rented by Kirby to the United States a *place*, within the terms of the constitution, within or over which the United States had "sole and exclusive jurisdiction?" There are several reasons why this jurisdiction did not exist. The places over which exclusive jurisdiction is granted, are those which have been *purchased* by the United States for some of the purposes specified in the constitution, and the grant of power does not extend to a place or tract of land *rented* by the Government for a temporary purpose. An unanswerable objection to the exercise of exclusive jurisdiction in this case is that the tract of land was not purchased of the United States *by consent* of the legislature of the State of Ohio, for this consent is essential to the exercise of exclusive jurisdiction by the United States.

Again, it is clear, the purpose for which the land was rented is not within any of the specifications of the constitution, or within the scope of any of the terms used. The land was not purchased for the purpose of constructing a fort, magazine, arsenal, dock-yard, or other needful building. The constitution clearly implies the *permanent use* of the property purchased for the construction or erection of some of the structures designated, or some other needful building. It would be strange, indeed, if such an agreement for renting a piece of land to the United States should deprive the State of Ohio of all jurisdiction over it, and confer sole and exclusive jurisdiction to the United States. It is not in the power of a citizen thus to dispose of the right of a State over any part of her territory. The averment, in

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the indictment, that this tract was within the limits of Camp Hurtt, a military camp of the United States, does not withdraw it from the jurisdiction of the State. The jurisdiction of the United States would only be such as was necessary for military purposes, such as were required for the enforcement of discipline and the execution of the rules and articles of war. It seems clear, too, on the authority of the case of the *United States v. Davis*, 5 Mason, 356, that to sustain an indictment under section 16 of the act of 1790, the jurisdiction of the United States over the places referred to in the statute must be *sole* and *exclusive*; if merely concurrent with a State, the courts of the United States have no jurisdiction of the offense.

The plea to the jurisdiction is sustained.

(DISTRICT COURT.)

THE UNITED STATES *v.* EDWARD L. HUGHES.

The proclamation of the President of the United States, of December 8, 1863, extending amnesty to persons who directly or indirectly participated in rebellion, included within its terms a citizen of the State of Ohio, indicted for treason against the United States.

A citizen who has complied with the requirements of such proclamation, is not excluded from its protection by a subsequent explanatory proclamation of the President, issued after such compliance, debarring persons in civil custody from its operation.

Flamen Ball, District Attorney, for United States.

J. H. Thompson, for defendant.

OPINION OF THE COURT:

The indictment against the defendant was returned and filed in this court on March 9, 1868. In this indictment the defendant is charged in two counts with the crime of

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treason. In the first count, after a recital of the fact of war or rebellion being carried on against the United States by the so-called Confederate States of America, it is averred that the defendant, being a citizen of Ohio, and as such owing allegiance to the government of the United States, on July 16, 1863, at the county of Pike, in said State, and within the Southern District of Ohio, "wickedly, maliciously, and traitorously, did ordain, prepare, and levy war against the United States of America." The second count is similar to the first in its recitals, but avers, as a specific or overt act of treason, that the defendant, on the day before named, at the same county, wickedly and traitorously gave aid and comfort to John Morgan and those associated with him in a forcible and armed invasion of the State of Ohio, prosecuted under the authority of said Confederate States of America, "by guiding, piloting, and escorting the said Morgan and his associates through certain portions of said State."

The defendant having been arrested on said charge has appeared and filed, first, the plea of not guilty; and, secondly, a plea of pardon by the President of the United States by the operation of the amnesty proclamation of December 8, 1863. This plea recites the proclamation in full, and then avers that the defendant, on March 1, 1864, appeared in this court and took and subscribed the oath prescribed in said proclamation, in virtue of which he claims that he can not be held to answer to the charge for which he is indicted. The plea also avers that the defendant is not within any of the exceptions set forth in the proclamation.

To the defendant's plea of pardon, the district attorney, in behalf of the United States, has interposed a general demurrer. And this presents the question now to be decided by the court.

In the argument upon the demurrer, the only points insisted on by the district attorney, were: 1. That it was not within the scope and intention of the proclamation of December 8, 1863, that citizens of a loyal State charged

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with treason against the United States should be included in the amnesty or act of grace which it extended to others. 2. That if included in such proclamation, the amended or explanatory proclamation of March 26, 1864, excludes the defendant from all its benefits.

The first point stated is to be determined by the language of the proclamation of December 8, 1863. If, by a fair construction of its terms, the defendant is within its scope, and has complied with the conditions on which it offers a pardon, he is legally entitled to its full benefits, whatever may be the views of others as to the policy of such a sweeping amnesty.

Now the proclamation, after some recitals which it is not necessary to notice, is in these words: "I, Abraham Lincoln, President of the United States, do proclaim, declare, and make known to all persons who have directly, or by implication, participated in the existing rebellion, except as hereinafter excepted, that a full pardon is hereby granted to them and each of them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third persons have intervened, and upon the condition that every such person shall take and subscribe an oath, and thenceforward keep and maintain said oath inviolate." Then follows the form of the oath to be taken by the person wishing to avail himself of the amnesty. Without reciting it at length, it may be stated that it is in substance an oath to support the constitution of the United States, and faithfully to comply with all acts of Congress and all proclamations of the President, looking to the suppression of the rebellion.

There seems to be no ground for a doubt, that the defendant is within the terms of the amnesty. The offer of grace is "to all persons who have directly or by implication participated in the existing rebellion." Then follows an enumeration of "the persons excepted from" the benefits of the offer of amnesty. It may be noted here that the defendant's plea of pardon avows expressly, as it was necessary to do, that he is not one of the persons

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exempted from the operation of the amnesty. The demurrer to the plea admits the truth of this averment; and if its truth did not otherwise appear, the court would be bound to receive it as true. But it is clear by reference to the proclamation, that the case of a citizen or resident of a loyal State, charged with treason committed within such State, is not within the enumerated exceptions. These exceptions are minute and very clearly stated in the proclamation, but by no allowable canon of construction is the defendant within the scope or meaning of the words used. Such, it is believed, was the view of all intelligent men when the proclamation was first promulgated. Such certainly was the opinion of the attorney-general of the United States, who issued official instructions to the district attorneys to dismiss all prosecutions where the person accused shall take the oath of allegiance and fidelity to the Union, as provided for in the proclamation.

The second point made by the district attorney in support of the demurrer to the defendant's plea of pardon, is clearly not sustainable. This point, as before stated, is, in substance, that although the defendant may be within the terms, and entitled to the benefit of the original amnesty proclamation, he is excluded from these benefits by the supplemental or explanatory proclamation of March 26, 1864. This proclamation, after reciting that it had "become necessary to define the cases in which insurgent enemies are entitled to the benefits" of the proclamation of December 8, 1862, declares that it "does not apply to persons taking the prescribed oath of allegiance and fidelity to the Union, who are in military, naval, or civil confinement or custody, or under bonds, or on parole of the civil, military, or naval authorities, or agents of the United States, as prisoners of war, or persons detained for offenses of any kind, either before or after conviction."

The only inquiry before the court as to this point is whether the second or explanatory proclamation can in any way affect the *status* or rights of this defendant. It

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has been already stated that the plea avers, and such are the facts of the case, that after the return of the indictment against the defendant, namely, on March 1, 1864, he appeared in court and took the oath prescribed. The explanatory proclamation bears date the 26th of that month. It will be obvious, therefore, that when the defendant took the oath, and thereby claimed the benefits of the President's offered amnesty, the first proclamation was in full force. Now, it is a proposition too clear to require arguments or authorities to sustain it, that if the defendant, by a compliance with the terms of mercy proposed in the first proclamation, has entitled himself to its benefits, no subsequent act of the President, or of any other department of the government, could deprive him of the rights so acquired. To give the second proclamation a retroactive operation, and thus doom the defendant to a punishment from which he had been legally exonerated, would be in violation alike of reason and of law. If it were true that the high crime charged against the defendant could be sustained by satisfactory evidence, it is far better that he should escape punishment than that a plain principle of law should be set at naught.

I am clear, therefore, that the special plea of the defendant must be sustained, and the demurrer overruled.

CIRCUIT COURT.)**JOHN BLAIR v. THE WESTERN FEMALE SEMINARY.**

The plaintiff, having left Cincinnati in 1856, with the purpose of permanently residing in Chicago, and having resided there till 1859, in the meantime exercising the right of voting in Illinois, was a citizen of that State in 1858, when this suit was brought, and had a right to sue in this court, though he afterward returned to Cincinnati.

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The fact, that his wife and younger children remained at Cincinnati did not, under the circumstances of this case, prevent the plaintiff from becoming a citizen of Illinois.

C. D. Coffin, for plaintiff.

S. J. Thompson, for defendants.

OPINION OF THE COURT:

For some unexplained reason, this case has been pending in this court since the year 1858. It was brought by the plaintiff, as a citizen of Illinois, to recover an alleged balance due him on a contract for building the Western Female Seminary, an incorporated institution located at the town of Oxford, in Butler county.

The defendant has at length appeared to the action, and has filed a plea to the jurisdiction of the court, on the ground that the plaintiff was a citizen of the State of Ohio at the time suit was brought, and has since continued to be such. The plaintiff has joined issue with the defendant, and the question of jurisdiction is the only one now before the court.

The evidence seems to be conclusive, that the plaintiff, having previously resided with his family, at Cincinnati, was unfortunate in business as a brick-maker and brick-layer; and in the year 1856, removed to Chicago, leaving his family here, with the intention of taking them to Chicago at a subsequent time and making it his permanent residence. His purpose, as he states in his testimony, in leaving his wife, was that his younger children might be educated at the high school in Cincinnati. He continued at Chicago, in pursuit of his business, until 1859, intending, up to that time, to remove his family and continue his residence permanently there. His wife, however, being opposed to living at Chicago, in 1859 he came back to Cincinnati. The testimony is satisfactory to prove his intention to have

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been, in going to Chicago, to make that place his home. It is also proved, by those who knew him intimately, that while absent he was regarded as having his residence at Chicago. And, in support of this conclusion, it is proved that while there he voted for two successive years, including the year in which this suit was commenced.

It is clear that, in this state of facts, the plea to the jurisdiction is not sustained. The plaintiff was a citizen of Illinois in 1858, when this suit was brought, having gone there without any intention of leaving, and having there exercised the right of voting as a citizen of that State. He was not, therefore, at that time a citizen of Ohio, and had an undoubted right to sue in this court. The fact, that owing to his wife's opposition to living at Chicago he subsequently left the place, does not prove he did not go there for a permanent settlement, nor that he was not a citizen of Illinois when this suit was brought. His subsequently formed purpose of leaving Chicago can not affect or invalidate the evidence of his actual residence there at the time stated. Neither does the fact of his leaving a part of his family at Cincinnati, under the circumstances proved, negative the fact of citizenship in Illinois. 6 How. 163, 185; 14 Id. 422.

The plea to the jurisdiction is overruled.

(CIRCUIT COURT.)**THE UNITED STATES v. DAVID WATTS, EXECUTOR OF SUSAN HOARD:**

An executor was directed to sell certain designated parcels of real estate belonging to the testatrix "and convert the same into cash," and "out of the proceeds thereof to pay any debts I may have, and the above-named legacies," and in pursuance of such provision of the will, the

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executor sold the property referred to. *Held*, that such legacies are not subject to the tax or duty imposed by section 111 of the internal revenue act of July 1, 1862, upon legacies arising from personal property.

In limiting the scope of the law to legacies arising from personal property, the inference is irresistible that it was intended to exempt such as were payable from the proceeds of real estate.

The courts of the United States are not at liberty by construction or legal fiction to include subjects of taxation not within the terms of the law.

Flamen Ball, District Attorney, for United States.

H. C. Whitman, for defendant.

OPINION OF THE COURT:

This is an action of debt, prosecuted by the United States to recover the amount of a tax or duty claimed as due from the defendant, as executor of Susan Hoard, deceased, on certain legacies in her will. The claim is based on section 111 of the internal revenue act of July 1, 1862, 12 Stat. at Large, 489. The amount of the duty charged against the executor on said legacies, and demanded in this action, is \$323.75. The executor, not being satisfied that the legacies were legally chargeable with the tax or duty claimed, has refused to pay it until the right of the government is settled by the judgment of this court. He has therefore appeared by counsel to the present action, and filed his plea to the effect that he does not owe the sum claimed; and this presents the issue now to be decided by the court.

The facts which it is material to notice are that Mrs. Hoard, by her last will and testament, executed on December 21, 1863, and which has been duly admitted to probate, made certain specific pecuniary legacies to certain churches, family relations, and other persons. She died possessed of a number of houses and lots in the city of Cincinnati, and by section 9 of her will she directed the executor to sell certain designated parcels of her real estate, "and convert the same into cash," and "out of the proceeds thereof to pay any debts I may have, and the above-named legacies."

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And in pursuance of this provision of the will, the executor has sold the property referred to.

In behalf of the United States, it is insisted by the district attorney that these legacies are chargeable with a tax or duty in accordance with the provisions and specifications of section 111 of the act before referred to. This section provides in its designation of legacies subject to the tax or duty, "that any person or persons having in charge or trust as administrator, executor, or trustee of any legacies or any distributive shares arising from personal property of any kind whatsoever, where the whole amount of such personal property as aforesaid shall exceed the sum of one thousand dollars in actual value, shall be subject to a tax or duty on such legacies or distributive shares" at certain specified rates, varied as the legatees may stand related or be strangers to the testator.

The only question for the decision of the court is whether these legacies are subject to the tax or duty imposed by the statute as "arising from personal property." It is contended by the district attorney that by an equitable construction of the statute, they are within the scope of the words used in the law, although by the terms of the will of Mrs. Hoard, they are payable out of the proceeds of the real estate directed to be sold for that purpose. On the other hand, it is insisted by the counsel for the defendant, that the statute can not be constructively extended so as to embrace a legacy arising from real estate, and must be understood in a sense consistent with the plain and natural import of the words used.

This is the first case in which this question has been presented to this court for its decision; and the court is informed that it has not been before any other court in this country for consideration. The statute is comparatively recent in its origin, and in giving it a construction it is not to be expected that the court will be aided or enlightened by any authorities or precedents derived from the action of our own court.

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The first remark which is to be made is, that there is no ambiguity or obscurity in the terms used in the clause of the statute referred to. It declares, in plain language, that the tax or duty is chargeable only on legacies arising from personal property. The distinction between such legacies, and those arising from the proceeds of real estate, is so obvious that it can not be presumed the framers of the law intended wholly to ignore it. If it had been their intention that all legacies, whether derivable from real or personal property, should be subject to the tax or duty, that intention would doubtless have been made known by the use of clear and appropriate terms. But in limiting the scope of the law to legacies arising from personal property, the inference is irresistible that it was intended to exempt such as were payable from the proceeds of real estate. Such would seem to be the fair construction of the language used by the legislature in the clause under consideration.

It is clear to the court that this is not a case in which the court can constructively hold that the legacies in question are to be regarded as arising from personal property, though in fact derived from realty. It is true that courts of equity, in some cases, for the purpose of carrying out the intention of a testator and subserving the ends of justice, resort to a fiction by which realty is treated as personalty. But this principle has no application to the construction of a statutory enactment, which is clear and explicit in its language. The statute in question abounds in penalties for its violation. The defendant in this action is subject to a penalty for refusing payment of the duty or tax claimed on these legacies, if such duty or tax is legally chargeable. In accordance with the well-settled rules of construction, statutes of this character can not be so construed as to extend their meaning beyond the clear import of the words used. It is the duty of the courts of the Union undoubtedly, so far as they are invested with any agency in carrying out the financial purposes of the gov-

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ernment, fairly to enforce the revenue laws of the country, and see that they are not fraudulently evaded. But they are not at liberty, by construction or legal fiction, to enlarge their scope to include subjects of taxation not within the terms of the law. It belongs exclusively to the legislative department of the government to define and declare upon what subjects taxes shall be imposed, and to provide the agencies by which they shall be assessed and collected. And however expedient it may seem, under certain circumstances, to invade the proper domain of legislation by judicial construction, it is clearly in conflict with the theory of the government.

The district attorney, in his brief, has referred the court to a case in the English Court of Exchequer, which he thinks sustains the construction of the clause of the statute under consideration, as insisted on by him. The case cited for this purpose is reported in 1 Price's Exchequer Reports, 426. It was an information under a clause of the act of 48 Geo. 8, ch. 149. That clause, as appears from the Report, imposed a duty or tax on all moneys arising from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument," etc. A preceding clause of the same schedule in the statute referred to, imposed a tax or duty on all legacies payable out of or arising from the "personal or movable estate" of the testator. The counsel for the government has referred to the case in Price's Reports as having arisen under this latter provision of the English statute. But this is clearly a misconception of that case, and it has therefore no bearing upon or application to the case before the court. The clause last cited is substantially the same as section 111 of our statute, laying a tax or duty on legacies arising from personal estate. And if the English Court of Exchequer had decided that legacies payable out of real estate were by construction to be regarded as legacies from personal property, the decision would be in point. Though

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I am by no means prepared to say that if such had been the ruling of the English court, that I should feel justified in receiving it as an authority in giving a construction to our statute. But the report referred to shows clearly that the decision was based on another clause of the English statute. The facts were, substantially, that a testator, being the owner of certain freehold estate, directed it to be sold by his executors, and that from the proceeds, after payment of his debts, a legacy of £5,000 should be paid. The personal estate of the testator was more than sufficient to pay his debts and discharge the legacy, without selling the real estate as provided for in the will. The legatee, by some arrangement between the parties, took the real estate from which the legacy was to be paid. And the court held that the legatee could not evade the payment of the tax or duty, but was liable therefor, though the legacy was not in fact paid in money. But, as before remarked, this decision was made under the clause of the English statute imposing a tax or duty on legacies derived from real estate. And under that clause, the court was probably right in holding, that as the property was directed to be sold unconditionally for the satisfaction of the legacy, and the legatee was the recipient of the benefit of the legacy, they would consider that done which the will had directed to be done.

But a more recent case, in the English courts is referred to by the counsel for the defendant in the case before the court, which applies to this question, and is a direct authority against the right of the government to claim a tax or duty on the legacies referred to, in the will of Mrs. Hoard. This case is noted in the recent work of Edwards on the Stamp Act of the United States, page 198, and the reference by the author is to the report in 9 Jur. 486, and 4 Hare, 315. These reports are not accessible to me, and I have not therefore read them. As stated by Edwards, the question was, whether real estate purchased with partnership assets, and used for partnership purposes, was liable to probate duty under the English statute on the

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death of a partner. The particular clause of the statute under which the tax or duty was claimed, is not stated in the abstract of the case as given by Edwards. Without taking the trouble to set forth the facts of the case, it will be sufficient to refer to the opinion of the court, as copied by Edwards, page 202. The court says: "In the simple case I have put, of land directed to be converted into money, I think the answer to the claim of the crown would be that the property in question was in fact real estate at the death of the testator, and as such not liable to probate duty, and that equity would not alter the actual nature of the property for the purpose only of subjecting it to fiscal claims to which at law it was not liable in its existing state, and certainly not intended to be made liable by the stamp act." And the court hold further, that the fact that the property in question was the property of a partnership made no difference in respect to its liability to probate duty.

This case clearly establishes the doctrine that by no construction of law can property be regarded within the scope and operation of our revenue law, as different from its real character. As a necessary result, in the absence of any statutory provision imposing a tax or duty on legacies arising out of real estate, there is no authority for the doctrine that such a legacy shall be treated as arising from personality.

But, without stating other views pertinent to the question before the court, leading to the conclusion which has been indicated, I am fully satisfied that by no construction of the statute can the defendant, as executor of Mrs. Hoard, be adjudged liable to pay a tax or duty on the legacies in question. The statute in its terms is too clear to admit of doubt as to its construction. If Congress think it expedient to legislate further on this subject, and declare that legacies arising from real estate shall be subject to a tax or duty, they will doubtless do so, in plain and intelligible terms. As the statute now stands, such an intention is clearly negatived.

Judgment will therefore be entered for the defendant.

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(DISTRICT COURT.)

THE UNITED STATES v. ONE HUNDRED AND THIRTY BARRELS
OF WHISKY.

In a proceeding in the District Court of the United States against property seized as forfeited under the internal revenue laws, to which a claim is interposed, the claimant has a constitutional right to a trial by a jury.

Congress has no power by legislation to provide for any other mode of trying a case, in which the right of trial by jury is secured by the constitution.

The provision of the statute, declaring that "the proceeding to enforce said forfeiture of said property shall be in the nature of a proceeding *in rem*," is not to be construed as authorizing a trial on strict admiralty rules, and without the intervention of a jury.

Flamen Ball, District Attorney, and *H. C. Whitman*, for United States.

J. B. Stallo, for claimant.

OPINION OF THE COURT:

The motion before the court is for a trial by jury in four distinct informations, prosecuted in behalf of the United States, for the forfeiture of about one hundred and thirty barrels of whisky, alleged to have been manufactured and sold in violation of the internal revenue act of June 30, 1864. The whisky was seized in this district, and is now in the custody of the law. Claimants have intervened in each of the four cases, and in the answer and claim of each the reasons and ground of forfeiture alleged in the several informations are denied. The question is, whether these claimants are entitled, in the trial of the issues made, to the intervention of a jury.

It is insisted by the counsel for the United States, that these informations are before this court as cases in admiralty jurisdiction, and must be tried according to the known and settled usages of courts of admiralty, in which the trial by jury is unknown. On the other hand, it is claimed,

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that as the seizures of the property in question were on the land, they must be tried as cases at law, in which the right of a jury trial is secured by the constitution of the United States.

The seventh amendment to the constitution declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." And it is too clear to admit of doubt, that if these are cases *at common law*, they are within this clause of the constitution, and the parties are entitled to a trial by jury. It is equally clear that Congress has no power under the constitution to deprive a suitor of this right, by declaring that a case not properly within the jurisdiction of the admiralty, shall be treated and dealt with according to the known principles of courts of admiralty. In defining the judicial power of the national government, the constitution declares—article 3, section 7—among other things, that it shall extend "to all cases of admiralty and maritime jurisdiction." The Congress of the United States, in giving effect to this constitutional provision, have enacted that the district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures made under the laws of import, trade, or navigation, on waters navigable from the sea by vessels of ten or more tons burden. These courts are also vested with exclusive original cognizance of all seizures on land, or other waters than as aforesaid. Sec. 9, act of September 24, 1789, 1 U. S. Stat. 73. The same section reserves to suitors the right of a common law remedy, where the common law is competent to give it; and also provides "that the trial of issues of fact in the district courts in all causes, *except* civil causes of admiralty and maritime jurisdiction, shall be by jury."

It is obvious that in this legislation Congress had in view the distinction between cases of proper admiralty jurisdiction and cases of seizure on land, or on water-courses, not properly within the scope of that jurisdiction. And in the

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latter class of cases, jurisdiction is vested in the district courts, not because they are courts of admiralty, but because they are courts created under the constitution. But in confining this jurisdiction, the statute is careful to reserve to suitors the right of trial by jury, in all cases of seizures which are not of admiralty cognizance.

Now the cases before the court arise under section 68 of the act of June 80, 1864, which imposes the penalty of a forfeiture for any refusal or neglect to comply with the law regulating the duties payable by the distiller of spirits. By such neglect or refusal, not only the vessels and machinery used in distillation, but the liquor manufactured, are subject to forfeiture. And at the close of the section it is provided, that "the proceedings to enforce said forfeiture of said property shall be in the nature of a proceeding *in rem*, in the circuit or district courts of the United States for the district where such seizure is made, or in any court of competent jurisdiction."

It is so clear as scarcely to need a word of argument, that Congress have not conferred, and did not intend to confer, on the courts named, admiralty jurisdiction in the sense of requiring that cases arising under section 68 should be tried as cases of strict admiralty jurisdiction. It would be an impeachment of the intelligence of that body to suppose they intended a seizure on land should be considered as one within the scope of such jurisdiction. In declaring that the proceedings should be in the nature of a proceeding *in rem*, nothing more was intended than to provide for a summary and effective mode of enforcing the act of Congress. The *thing*—the property subject to forfeiture is to be seized and held in possession subject to the action of the court. And this for the obvious reason, that a proceeding against the person merely would not give an available remedy for a fraudulent attempt to evade the law.

It is true the right to a forfeiture of the property in question is set forth in the form of a libel, a term used as appropriate to proceedings in admiralty. But this can not

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change the character of the suit, nor bring the subject of it within the range of the admiralty jurisdiction of this court. It might as well have been presented by a petition or declaration, or any other convenient mode. The sole question is, are the facts such as to show that the party proceeded against has a right to a trial by jury. And on this subject, the case of *Parsons v. Bedford et al.*, 3 Peters, 488, is an authority in point. The opinion of the Supreme Court of the United States in that case was prepared by the learned Judge Story, in which he holds: "That the amendment to the constitution of the United States, by which the trial by jury was secured, may, in a just sense, be well construed to embrace all suits which are not of equity or admiralty jurisdiction, *whatever may be the peculiar form they may assume to settle legal rights.*"

To the same effect is the decision of the Supreme Court in the case of the *Sarah*, 8 Wheaton, 891. It was a case prosecuted for a forfeiture under the revenue laws of the United States then in force. Although the property seized was a ship, it appears the seizure was made on land. And the court say: "In cases of seizure on land under the revenue laws, the district court proceeds as a court of common law, according to the course of exchequer informations *in rem*; and the trial of issues of fact is to be by jury." 1 Peters, 547.

The motion for a jury is granted.

(CIRCUIT COURT.)

ADOLPH HAMMER v. KLEIN AND BROTHER.

If, in his declaration, a plaintiff makes profert of the bond declared on, and also a collateral agreement necessary to establish his right to recover on the bond, the defendant may crave oyer of the bond and the collateral agreement.

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As the legal effect of the profert of the papers, they are presumed to be in court, and the opposing party has a right to know their contents, and oyer will be granted on his application.

The right to oyer in a proper case, is a part of the common law system of special pleading, which, in a modified form, has obtained in this court from its first organization.

Kebler & Whitman, for plaintiff.

Stallo & Kittredge, for defendants.

OPINION OF THE COURT :

This case is before the court on a motion by the counsel of the defendants for an order on the plaintiff for oyer of the bond and agreement set forth in the declaration.

For the purposes of this motion, it is not necessary to state in detail the particulars of the plaintiff's claim as set out in the declaration. The plaintiff's cause of action is based on a bond executed by one of the defendants in the penalty of \$30,000, in connection with a collateral agreement signed by the parties, by which the plaintiff bound himself to do certain acts therein specified, before the defendants should incur the penalty named in the bond. These acts, the declaration avers, have been performed by the plaintiff, whereby the defendants have become liable to pay the penalty of the bond. The declaration makes profert, both of the bond and the collateral agreement.

The counsel for the plaintiff insists that in this state of the case the defendants are not entitled to oyer as prayed for, either by the rules of pleading in this court, or by the common law.

There can be no question, that under the common law system of pleading, oyer of any instrument of writing, of which profert is made in the declaration, may be demanded, and will be granted, of course. As to instruments of writing collateral to the bond, it is clear, if profert is made of them, oyer may be craved, although the profert may have been made without any necessity for it. Profert being made, the writing is presumed to be in court, and

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oyer may be required. 1 Chitty's Pleadings, 363 (Ad. edition); Stephens on Pleading, 447. In this case, it seems, profert of the agreement was properly made, as it was essential to give the plaintiff a right of action on the bond. It is, in fact, the sole basis of his claim to recovery on the bond, and oyer may be claimed, both of the bond and the collateral agreement.

It seems to be supposed by plaintiff's counsel that the right of a party in a case in this court, to demand oyer, is abrogated by the operation of the seventh rule of this court, adopting certain provisions of the Ohio code as rules of this court. But this rule clearly applies only to such papers or instruments of writing, which are to be used incidentally as evidence, and not to such as are in the possession of the plaintiff, and which constitute the basis of the action. Neither the rule referred to, nor any other rule of this court, has abolished the common law system of special pleading. Though the system has been greatly modified, it still exists, and has existed and been recognized from the first organization of the federal courts in this district. And the right to demand oyer in proper cases, being a part of this system of pleading, the court has no hesitation in making the order prayed for in this case. Oyer is accordingly ordered.

(CIRCUIT COURT.)**WILLIAM ROBINSON v. JAMES P. KILBRETH.**

An accommodation indorser of a bill of exchange, who, after protest for non-payment by the acceptor, pays the bill, has a right of action against such acceptor.

In the absence of any proof of an agreement between an acceptor and the indorser of a bill, that in case of default of payment by the maker, the parties shall be liable to each other as sureties, the liability of the

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acceptor and indorser attaches in the order in which their names appear on the bill, and, in case of payment by the acceptor, being the person primarily liable, he has no right to contribution from the indorser.

Where there has been a series of bills drawn by a third party, on some of which the plaintiff was acceptor and on others indorser, and on some of which the defendant was acceptor and on others indorser, and the defendant pays a bill on which he was acceptor and the plaintiff an indorser, both being accommodation parties, the defendant can not set off such payment against the plaintiff's claim for money paid by him on another bill on which the defendant was acceptor and the plaintiff an indorser.

Nor can the defendant in such case recover of the plaintiff as indorser for money paid and advanced to the drawer of the bill for plaintiff's use, without proof that the plaintiff was a party to and interested in such an arrangement.

Curwen & Wright, for plaintiff.

Mr. Todd, for defendant.

OPINION OF THE COURT:

This suit is brought by the plaintiff as the holder of a bill of exchange for \$1,000 drawn by J. B. Guthrie, at Pittsburg, December 30, 1852, at four months, payable to the order of the defendant, and accepted by him. The bill was discounted at the Lafayette Bank of Cincinnati, and not being paid at maturity by the acceptor, was duly protested for non-payment. It was then sent to a bank in Pittsburg for collection, and placed in the hands of the attorney for the bank, for the purpose of enforcing payment against the plaintiff, Robinson, as indorser. He paid the bill without suit, and it was delivered to him. It is not controverted that he is the *bona fide* holder of the bill for value. It is also a fact in the case that both the plaintiff as the payee and indorser, and the defendant as acceptor, were accommodation parties.

Upon this state of facts, there can be no question that the plaintiff is entitled *prima facie* to a judgment. The

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law is well settled on this point. Judge Story, in his treatise on Bills of Exchange, section 253, says: "Indeed, it may be laid down as a general rule, that a *bona fide* holder for value is entitled to the same rights and remedies against an accommodation acceptor as he is against an acceptor for value, although he knows that it is an accommodation acceptance." And again, in section 269, the author says: "It is wholly immaterial whether the acceptance be an accommodation acceptance or one for value; for in each case, so far as the bill is concerned, the acceptor is the party primarily liable, and all the others stand only as collaterally liable for the payment." The same doctrine is laid down by 1 Parsons on Notes and Bills, 237. He says: "If a bill be indorsed for the accommodation of the drawer, and afterward accepted, the indorser by payment acquires a claim against the acceptor as well as against the drawer, for he is not a surety for the drawer to the acceptor, but for both to the holder." To the same effect is the case of *Williams v. Bosson*, 11 Ohio, 62, and *Kelly v. Few*, 18 Ohio 441.

The defendant, however, as defenses in this action, in addition to the plea of general issue, has given special notice of set-off, based on a bill of exchange for \$2,000, of which he alleges he is the holder, and which, as he claims, was paid by him for the benefit of the plaintiff; and also a set-off of \$2,000, for so much money paid for the use of the plaintiff. A failure of consideration is also insisted upon by the defendant as a ground of defense.

The question of set-off seems to be the only one requiring the consideration of the court. And its solution depends on the facts given in evidence by the parties. The facts as thus exhibited are numerous and somewhat complicated in their character. The outline, as involving the transactions of these parties, may be briefly stated as follows: Sometime prior to the year 1851, there was a manufacturing firm at Cincinnati, under the name of James V. Guthrie & Co. John B. Guthrie, the drawer of the bill on which this suit is brought, was the brother of J. V. Guth-

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rie, and lived at Pittsburg. John B. Guthrie had intended to become a partner in the firm of J. V. Guthrie & Co., but subsequently abandoned such purpose. The firm of J. V. Guthrie & Co. lacked the necessary capital to carry on their business, and was obliged to resort to bank accommodations to enable them to do so. To effect their object, at the special request of John B. Guthrie and for his accommodation, the plaintiff, Robinson, a man of large means and undoubted credit, living at Allegheny City, agreed to lend the use of his name to raise money for said firm. The usual course was for John B. Guthrie to draw on James V. Guthrie & Co., to the order of Robinson, who indorsed the bills; and, at maturity, they were taken up by the proceeds of his acceptances, which were usually discounted by banks at Cincinnati. Some time in the year 1851, the firm of J. V. Guthrie & Co. failed, and their credit was so far impaired that the Cincinnati banks refused further to discount their paper. To save them from protest, John B. Guthrie, through his brother, William Guthrie, requested the defendant Kilbreth to lend the use of his name in the place of J. V. Guthrie & Co. To this, Kilbreth assented, saying at the time to William Guthrie, that it must be understood that he was to incur no liability thereby. This condition was made known to John B. Guthrie, but never to the plaintiff. Nor does it appear that the plaintiff requested Kilbreth to go on the paper, or had at the time any knowledge of the arrangement between him and John B. Guthrie.

At the time Kilbreth agreed to lend the use of his name, the bills of J. V. Guthrie & Co., outstanding and unpaid, amounted to \$4,600. On all this paper, John B. Guthrie was the drawer and the plaintiff either indorser or acceptor. This sum was in bills of different amounts, and had been discounted at different banks. Pursuant to the arrangement with the defendant, as these bills matured they were paid by the proceeds of other bills drawn by John B. Guthrie, each bill having the name of plaintiff or defendant

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either as acceptor or indorser. These bills were finally reduced to and consolidated in two bills. One for \$2,500, dated August 27, 1852, drawn by the defendant, at four months, to the order of Kilbreth and De Camp, on the plaintiff Robinson, accepted by him, and indorsed by Kilbreth and De Camp. This bill was discounted at the Bank of Lawrenceburg, on the application of Kilbreth, and the proceeds were applied to take up paper at other banks on which Robinson was acceptor. This is the foundation, as I understand the argument of the counsel of the defendant, on which he claims a set-off against the plaintiff for money paid for his use.

The other bill set up in support of the set-off is a bill for \$2,000, dated August 28, 1852, drawn by Kilbreth, at four months, to the order of Kilbreth & De Camp, accepted by the plaintiff, and indorsed by said firm. This bill is now in the possession of Kilbreth, and it is insisted by his counsel that it is a legal set-off to the claim of Robinson on the \$1,000 bill sued on, and that he is entitled to a judgment after deducting the amount of said bill.

As to the \$2,500 bill referred to, the facts seem to be that it was sent by the Lawrenceburg bank to the Bank of Pittsburg for collection; and at maturity was paid by John B. Guthrie at that bank by the proceeds of a bill for \$1,500, drawn by him, indorsed by Robinson, and accepted by Kilbreth. This bill was discounted by Patrick & Fields, bankers at Pittsburg, and the proof is clear that it was paid some time after maturity by the drawee, John B. Guthrie. The other part of the \$2,500 bill was paid by the proceeds of a bill for \$1,000, drawn by Guthrie to the order of Robinson, indorsed by him, and accepted by Kilbreth. This is the bill on which this suit is brought. As already stated, it was discounted at the Lafayette bank of Cincinnati, protested for non-payment by the acceptor, paid by Robinson as indorser, and is now held by him. The \$2,500 draft having thus been paid and extinguished by Guthrie and Robinson, I can not perceive any ground on

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which the defendant's claim of set-off, based on this transaction, is sustainable. And so far as this suit is concerned, it may be left wholly out of view.

The only controversy in this case arises on the \$2,000 bill of August 28, 1852. This bill, as before noticed, was accepted by Robinson at the request and for the accommodation of John B. Guthrie. He sent the bill to Kilbreth, who indorsed it and procured its discount at the Trust Company at Cincinnati, on the day of its date, and received the proceeds. It was sent by the Trust Company to the Exchange Bank at Pittsburg for collection, and paid by Guthrie at or soon after maturity. The evidence that it was thus paid is incontrovertible. Guthrie testifies that he so paid it, and took up the bill and exhibited it to Robinson to satisfy him that he was discharged from liability. The fact of payment also clearly appears by the entries in the books of the bank, which are in evidence.

The defendant, however, claims that Guthrie paid the \$2,000 bill of the 28th of August by the proceeds of another bill for the same amount, dated December 1, 1852, drawn by Guthrie on Kilbreth to the order of Robinson, indorsed by him, and accepted by Kilbreth. This bill was negotiated at a bank in Cincinnati, and, as Kilbreth testifies, was paid by him at maturity. And it is insisted by his counsel, in a most elaborate written argument, that as the proceeds of the bill paid by Kilbreth were applied to take up the bill on which Robinson was liable as acceptor, such payment is a valid set-off to the plaintiff's claim in this suit, as so much money paid for the use of the plaintiff.

This presents in the view of the court, the only question involving any doubt in this case. After a careful consideration of the points made in the argument of the defendant's counsel, I am unable to concur in his conclusions. The solution of the questions involved depends upon the position which the parties occupied on the paper referred to, and the legal liabilities arising from it. Now, the rule of law is well settled by the authorities already cited, that

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all the parties upon accommodation paper, except the party accommodated, are to be treated as parties to business paper, and subject to the strict principles of commercial law applying to such paper; and that where there is no express agreement to the contrary, the legal conclusion is that each party stands in the relation to the others as on business paper. The acceptor on such paper is always liable to the other parties. The cases in 11 and 18 Ohio Reports before referred to, as well as the elementary writers cited, clearly sustain this position.

The fallacy in the extended argument of the defendant's counsel arises, as I think, from his assumption, that as between these parties there was an understanding, express or implied, that they were to stand in the relation of sureties for each other, and in the event of any loss each was to be liable to contribution. But the evidence does not sustain this view. It is true the defendant Kilbreth stated, when he lent his name for the accommodation of J. V. Guthrie & Co., that it must be understood he was to incur no responsibility thereby. It is not necessary to decide whether a party can limit his legal liability by such a declaration, for it is in evidence in this case that the plaintiff was never informed that the defendant had annexed such a condition in putting his name on the paper. The plaintiff can not be presumed, therefore, to have been affected in his action by such condition. The inference fairly deducible from all the facts is, that both the plaintiff and defendant had entire confidence in the ability of John B. Guthrie to protect them from ultimate liability; and with this impression, became parties on the paper. The plaintiff, in the strictest sense, was on the paper as either an accommodation indorser or acceptor for John B. Guthrie. He had no interest in the transactions in which the paper originated; he was not indebted to either of the Guthries, nor did he receive any remuneration for the use of his name on their paper. There was no request from him to Kilbreth that his name should be used, or any correspondence or communication

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between them on the subject. He might well have inferred, knowing the fact that Kilbreth was the brother-in-law of the Guthries, that his motive was to do them a favor, and in doing so was willing to incur the risk which he assumed by going on their paper. But without pursuing this view further, I am clear that there is nothing developed by the evidence, which, either expressly or by fair implication, justifies the conclusion that there was any agreement or understanding between these parties exempting them from the application of the settled principles of commercial law in determining their rights and liabilities.

There can be no question that the payment of the \$2,000 bill of the 28th of August, as before stated, by John B. Guthrie, in behalf of Robinson, the acceptor, was to all intents and purposes an extinguishment of that bill. It became by such payment *functum officii*, and could not be enforced against any of the parties. 2 Parsons on Notes and Bills, 216, 219; Byles on Bills, 193, 323. And I do not see on what ground the defendant can assert any rights as the holder of the bill. It is clear he could not sue Robinson as acceptor, and equally clear he can not set it up as a set-off in this suit. It was delivered by the collecting bank to John B. Guthrie as a paid bill. Guthrie could not transfer it to Kilbreth, and he swears he did not either transfer or deliver it to him. After payment he put it among his papers, and does not know how or when it came into the possession of Kilbreth. Kilbreth says he obtained it from William Guthrie, since deceased, but under what circumstances does not appear. He is not, therefore, the *bona fide* holder of the bill, and can assert no rights under it.

That Guthrie paid the bill with the proceeds of another bill discounted on the credit of the parties, does not, as it seems to the court, affect in any way the question under consideration. That was a matter distinct from, and independent of, the prior bill paid by Guthrie. It was not paid by a renewal of the same bill at the same bank, but by the negotiation of a new bill at a different bank. The pro-

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ceeds of the new bill was the money of John B. Guthrie, the payee, and he had a right to apply it according to his own pleasure. Guthrie swears that he raised the money, and paid the bill, which, as before remarked, put an end to its vitality as a negotiable instrument.

But it is insisted by defendant's counsel that if he has not a right of set-off, under the bill of August 28, 1852, his claim for money paid for the use of the plaintiff, in taking up the \$2,000 bill of the 1st of December is sustained. John B. Guthrie was the drawer of this latter bill; Kilbreth, the acceptor, and the plaintiff, an indorser. Guthrie negotiated it at a bank in Pittsburg; it was transmitted to the Trust Company, at Cincinnati, for collection, and there paid by Kilbreth as acceptor. He accepted the bill at the request and for the accommodation of Guthrie. As acceptor, he was bound to pay the bill at maturity, and in doing so, merely discharged a plain legal obligation. I can not perceive on what principle, under these circumstances, the law can imply a request by Robinson which subjected him to a liability to indemnify Kilbreth. They did not occupy the position of joint sureties, but each was independently liable in the order in which their names appeared on the bill. If Kilbreth had refused payment as acceptor, and the bill had been protested for non-payment, and afterward paid by Robinson as indorser, the authorities before referred to are clear to the effect that the indorser could sue the acceptor, and recover the whole sum so paid. If such is the law, it negatives the right of the defendant in this suit to recover on his claim of set-off, for money paid. 1 Parsons on Notes and Bills, 327.

It is not material to decide whether Kilbreth has a right, as against Guthrie, to recover the sum paid. As the drawer of the bill, at whose request and for whose accommodation he accepted, there can be no doubt Kilbreth has a remedy as against Guthrie. The cases and authorities cited before seem clearly to sustain this position. And such being the

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law, it results by fair implication that Kilbreth has no claim as against Robinson, the indorser.

In his work on bills of exchange, on the subject of the liabilities of an acceptor, Judge Story says, upon payment of the bill, he has no right of recourse against any of the prior parties, unless he is an accommodation acceptor on their account, and at their request. Sec. 263. The same principle is distinctly stated in section 410. In this case, as there is no pretense that Kilbreth accepted the bill at the request and for the accommodation of Robinson, the doctrine above stated has a direct application.

In conclusion, as in my judgment, there are no facts in this case withdrawing the question of the rights and liabilities of the parties, from the operation of the strict principles of commercial law as applicable to negotiable paper, I am led to the result that the plaintiff is entitled to recover on the \$1,000 bill paid by him, with interest from the date of the payment.

(CIRCUIT COURT.)

ORLANDO B. POTTER ET AL v. ANTON MULLER.

Whether a defendant, who has been enjoined from infringing a patent by manufacturing or selling the infringing article, continues to sell in his own right, or as the agent of another, he is equally guilty of a contempt, and is liable to attachment.

THIS was a motion for an attachment. The defendant had been enjoined (*Potter v. Muller*, 2 Fisher, 465), from infringing the patents of Allen B. Wilson for improvements in sewing machines; the machine in question having a wheel feed, in imitation of the Singer machine. He continued to sell machines after the service of the injunction, alleging that he had disposed of his establishment to his brother, and

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that he made sales, not in his own right, but as the mere agent or employe of his brother.

S. S. Fisher, for the motion.

G. E. Pugh, contra.

OPINION OF THE COURT:

I will state very briefly the grounds upon which I base my action in this case. Originally there was a bill in the name of O. B. Potter against the defendant, Anton Muller, charging an infringement in the manufacture and sale of sewing machines. The question of the validity of the patent and the novelty of the invention, as well as the question of infringement, were decided by the court on a motion to dissolve the injunction which had been previously ordered. That motion was very fully argued, and the court had no doubt at all that the complainant had fully made out his case, establishing the validity of his patent, and proving the infringement on the part of the defendant. The court, therefore, without hesitation, refused to dissolve the injunction, and made it perpetual.

Subsequent to this decision, but before the present term, there was an application for a rule against this defendant to show cause why he should not be attached for a violation of that injunction; and, upon a return of the rule and hearing, the court adjudged the defendant to pay a small fine of only twenty-five dollars and costs, with the admonition, however, that, if there was a repetition of the offense, he would be visited with a severe penalty. At the present term, the application has been made and granted for an attachment against the defendant for a second violation of the injunction. The defendant has appeared, and has filed answers to the interrogatories that were propounded to him. The question now to be decided by the court is, whether he has violated the injunction and incurred a second penalty? The present application for an

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attachment is predicated upon the affidavit of James W. Harnden, who swears, in substance, that some time in the early part of the present month he went to the manufacturing establishment of this defendant, and, after some conversation and negotiation, the defendant being present with his brother, he made a purchase of one of these sewing machines, which, it is distinctly admitted in the answer of the defendant himself, was a machine in violation of the plaintiff's patent. The affiant, Harnden, states, in substance, that this defendant avowed himself as acting as the agent of his brother, William Muller, stating to him that he sold out the establishment to his hands, and he was acting as agent only. It appeared, however, that in the sale of the machine, the defendant was not only present, but took an active part in the transaction, and although he avowed that his brother, William Muller, was the party interested, it is to be remarked that it does not appear that there was any *bona fide* sale or transfer of this manufacturing establishment by the defendant to his brother. Indeed, it appears from his own statement that if there was any sale or transfer, it was entirely without consideration; that his brother paid nothing for the manufactory, or for the use of the tools. Now, the only question is, whether this is a *bona fide* transaction, or whether it is a mere subterfuge, to evade responsibility and liability under the injunction that had been granted. One of the two propositions is undoubtedly true—either that this defendant was still the legal owner of that establishment, or, if he was not, he was the agent of the parties who were the owners. Harnden, in his affidavit, states that he avowed himself to be acting as the agent. In either case, if there has been a sale of the machine, that is an infringement of the patent and in violation of the injunction. This defendant is clearly liable whether he was, in fact, the owner of the establishment, or whether he acted as the agent of another party, as the injunction, in its terms, applies to and reaches the

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defendant himself, acting in any capacity, and all agents, employes, or servants.

I have no doubt at all that this pretended arrangement between this defendant and his brother was simply evasive, and, I must think, a very clumsy subterfuge to evade liability. If he was the owner of the concern (which appears most probable to the court, notwithstanding the pretended transfer), then he was liable. If he was acting as the agent of another party, he was liable also.

I am very clear, therefore, from the facts as they are before the court, that this party has violated the injunction, and it has been done under circumstances of aggravation. When this party was before the court at a previous term, he was admonished by the court that he incurred great liability in contemning the process and authority of the court; but there was some reason, at that time, to suppose that the defendant might have acted under some misapprehension in regard to the issuing of the injunction and its effect and operation upon him, and as he was a foreigner, the court, inclined to be as lenient as possible under the circumstances, adjudged a merely nominal fine against him.

It now appears that he has again violated this injunction without any excuse, and, certainly, with a full knowledge not only of its existence, but also of its effect and operation; and, under the circumstances of the case, it appears to be the imperative duty of the court to visit this party with a more severe punishment than was adjudged to him on the previous occasion.

I do not know what may be the views of the defendant in regard to his liability to obey the laws and respect the authority of the government. It is possible that, being a foreigner, and having come from a government of despotism to a land of freedom, liberty, and equality, he supposes that our institutions guarantee to him the right of doing as he pleases, without reference to law and the rights of others. That may be his conception of true liberty; but it is a great mistake, and foreigners should know that it is

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against the theory, and would lead to the utter destruction and overthrow of our institutions, if it were recognized and sanctioned. True liberty consists, undoubtedly, in obedience to the law; and there is no way by which the rights of individuals or the peace and good order of the community can be maintained, except by due respect to the authority of the law and the government of the country.

This party must know that he can not, and ought not, by any subterfuge, evade the liabilities which he has incurred under the orders and decisions of this court. It is not because the defendant owes any peculiar respect or reverence to the individual who occupies this place, but because he owes respect, reverence, and obedience to the authorities of the country and the laws of the land.

The defendant is adjudged to pay a fine of four hundred dollars and the costs of this proceeding, and to stand committed until the fines and costs are paid, or the court shall otherwise order.

APPENDIX.

Proceedings of the United States Circuit Court within the Southern District of Ohio, and of the Bar of Hamilton County, Ohio, on the Announcement of the Death of Hon. John McLean, Associate Justice of the Supreme Court of the United States.

THURSDAY, APRIL 4, 1861.

It having been announced, that MR. JUSTICE McLEAN, the presiding judge of this court, departed this life, this morning, at his residence near Cincinnati, it is therefore ordered that business be suspended, and the court do stand adjourned until 9½ o'clock to-morrow morning.

THURSDAY, APRIL 11, 1861.

STANLEY MATTHEWS, Esq., presented the following proceedings and moved the court that they be entered on its journal :

“ At a meeting of the members of the Hamilton County Bar, held in the United States Circuit and District Court room in Cincinnati, on Friday, April 5, 1861, on the occasion of the death of JUDGE McLEAN, JUDGE H. H. LEAVITT was called to the Chair, and WILLIAM M. DICKSON chosen Secretary. Whereupon, on motion, MESSRS. J. L. MINER, JUDGE BELLAMY STORER, M. H. TILDEN, HENRY STANBURY, WILLIAM JOHNSON, D. K. ESTE, C. D. COFFIN, and GEORGE E. PUGH were appointed a committee on resolutions, who, after retiring, came in and reported the following, which were unanimously adopted :

“ It has pleased God to terminate the mortal life of our friend and neighbor, JOHN McLEAN, late an Associate Justice of the Supreme Court of the United States. He died at his late resi-

dence in Clifton, near this city, yesterday morning, full of years and of honors—a man without reproach—a distinguished statesman—a patriot, untouched by degeneracy—a learned, laborious, patient, and upright judge—a benevolent and public spirited citizen—in all the relations of husband, father, friend, and neighbor, affectionate and faithful, a model christian gentleman. We sincerely mourn his loss, and deeply sympathize with the family and relatives in this affliction, and as a mark of respect for his virtues, his talents, his attainments, his exemplary life and character, we will attend his funeral in a body.

“Resolved, That a copy of these proceedings be presented by the District Attorney of the United States for this district to the Circuit and District Courts for entry on their minutes.

“That copies be presented by the chairman of this committee to the several courts of this county and city for entry on their minutes.

“That the chairman of this meeting communicate a copy to the family of the deceased.

“That the secretary furnish copies to the several newspapers of the city for publication.”

Thereupon, JUDGE LEAVITT made the following remarks :

“I have great pleasure in making known my cordial concurrence with the bar of this city in the well-deserved tribute of respect to the memory of JUDGE McLEAN embodied in the proceedings now presented. The terms of eulogy in which they have expressed their estimate of his high moral qualities and distinguished public services as a statesman and a judge are not exaggerated ; and it is fitting that his “great example and his name” should be honored by those who survive him. His life is deplored as a national loss ; all feel that a great and good man is dead. To the members of the bar of this court, in which for more than thirty years he has presided with so much ability, and so greatly to the acceptance of the public, his loss must be felt with peculiar sensibility. It has made a breach which can not be easily repaired. I sympathize deeply in the feelings of the bar, on the occasion of this afflictive dispensation of Providence. It is now nearly twenty-seven years since I became associated with JUDGE McLEAN on the bench of this court. His death has sundered a relation not only long continued, but which was throughout of the most friendly character. As his friend and surviving member of this court, it is not

strange that my heart should be sorely pressed with a sense of bereavement and desolateness; and I am glad of the opportunity of placing upon the records of this court a testimonial of my exalted estimate of his vigorous intellect, his well-balanced judgment, his great judicial learning and acquirements, and the uniform courtesy and integrity which marked his long career as a judge.

"The court orders the proceedings to be entered on its journal."

Charge of Judge Leavitt to the Grand Jury, on the Subject of Treason, at the October Term, 1861, of the United States Circuit Court.

GENTLEMEN OF THE GRAND JURY : You have been summoned and sworn as a grand jury of the United States for the Southern District of Ohio; and, according to the tenor of the oath you have just taken, it will be your duty to inquire into all crimes against the laws of the United States committed within the district; and, upon sufficient evidence, to return bills of indictment against the persons accused. It is not necessary, on this occasion, that I should refer specially to all the crimes and offenses defined and punished by the various acts of Congress, and which are properly within your cognizance as a grand jury. I shall therefore notice such only as you will in all probability be called upon to investigate in the proper discharge of your duties. Among these, I am informed, there will be some involving the charge of treason against the United States.

The constitution declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." The act of Congress of April 30, 1790, adopts the words of the constitution in defining the crime, and declares that on conviction in accordance therewith the punishment shall be death. Neither the constitution nor the act of

Congress specifies the precise acts which shall constitute the crime. As it would be impossible for any human intellect to foresee all the circumstances under which it might be committed, the framers of the constitution and of the statute wisely determined not to attempt such a specification. It was, therefore, a necessity that something should be left to the discretion of courts and judges, in determining what facts shall constitute treason. There is, however, a salutary limitation to the exercise of their discretion in the provision that there can be no conviction unless on the public confession of the accused party, made in court, or by the evidence of two witnesses to the same overt act of treason. The object of the provision is to prevent the probability of a conviction for a mere constructive treason. In the earlier periods of English history, the judges were often the pliant tools of the king, and exercised the power of punishing for constructive treasons, under circumstances the most revolting and greatly to the oppression of innocent persons. The wise and sagacious framers of our constitution have effectually guarded against such abuses of power, by declaring there shall be no conviction for this high crime on mere suspicion or on proof of any fact which is not an overt act of treason established by two witnesses. This provision applies as well to the legislative as to the judicial department of the government, and an act of Congress, therefore, in conflict with it would be a nullity.

It would be a vain effort to attempt to designate every act, which, in its legal import, would be levying war against the government, or giving aid and comfort to the public enemy after a war is actually begun. Under the first division of the constitutional definition of treason, there are some acts, the treasonable character of which are apparent to the mental consciousness of every one. To be employed in actual service in an army raised to oppose the government in its action, or directly or indirectly to aid or assist in the levying or embodying a military force for the subversion of the government, are plainly acts of levying war, and involve the commission of the crime of treason in its most aggravated form. But the words referred to have a broader signification. As remarked by Chief Justice Marshall, in the trial of Burr, those who join the hostile army after the war is begun, are equally guilty of levying war within the meaning of the constitution and the act of Congress. That learned judge states the law in these words:

"If a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are in the general conspiracy, are to be considered as traitors."

But without stopping to specify more fully what acts may be understood as a direct levying of war, I will notice briefly what are included in the words, "adhering to the enemies of the United States, giving them aid and comfort." This language leaves no room to doubt, that treason may be predicated of acts, which are not a direct levying of war according to the construction of that phrase, as just indicated. The words in the definition, *adhering to their enemies*, seem to have no special significance, as the substance is found in the words which follow—*giving them aid and comfort*. As before remarked, it is not an easy task to classify or specify the acts, which bring a party within the range of this branch of the definition. In general, when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs, gives them aid and comfort. Or, if this be the natural effect of the act, though prompted solely by the expectation of pecuniary gain, it is treasonable in its character. Without going into details on the subject, I will briefly notice some things clearly involving the guilt of treason. Thus, to sell to, or provide arms or munitions of war, or military stores, or supplies, including food, clothing, etc., for the use of the enemy, is within the penalty of the statute. And to hire, sell, or furnish boats, railroad cars, or other means of transportation, or to advance money, or obtain credits, for the use and support of a hostile army, is treasonable. It is equally clear that the communication of intelligence to the enemy, by letter, telegraph, or otherwise, relating to the strength, movements, or position of the army, is an act of treason. These acts, thus briefly noted, show unequivocally an adherence to the enemy, and an unlawful purpose of giving him aid and comfort.

It has been already noticed, that to justify a conviction for treason, unless the crime is confessed in open court, there must be the evidence of two witnesses to an overt act. The plain meaning of the words *overt act*, as used in the constitution

and the statute, is an act of a character susceptible of clear proof, and not resting in mere inference or conjecture. They were intended to exclude the possibility of a conviction of the odious crime of treason, upon proof of facts which were only treasonable by construction or inference, or which have no better foundation than mere suspicion. In its benign caution on this subject, the law requires not only proof of a treasonable act, but that it should be established by the oaths of two witnesses. Hence, it will be obvious that however strong may be the grounds of suspicion or belief, that an individual is disloyal to his country or his government, until his disloyalty is developed by some open and provable act, he is not legally guilty of the crime of treason. And it follows, also, that mere expressions of opinion indicative of sympathy with the public enemy, will not ordinarily involve the legal guilt of that crime. They may well justify a strong feeling of indignation against the individual, and the suspicion that he is, at heart, a traitor, but will not be a sufficient basis for his conviction in a court of law. Whether, on the principle of self-preservation in times of great public danger, the summary arrest of such a person, under the military authority of the government, may not be both necessary and proper, is a different question, not in any way connected with the discharge of your duties as grand jurors. There may be circumstances justifying the exercise of such a power as a military necessity. But the constitution and laws of the United States are your guides in the performance of your duties. You, as a grand jury, and this court, as a court of the Union, derive all their powers from this source. Neither can willfully overleap the limits prescribed for its action without a sacrifice of integrity and of all claim to the respect and confidence of every right-minded American citizen.

Without detaining you by any further exposition of the law of treason, I will call your attention to the offense of misprision of treason, defined and punished by section 2 of the act of 1790. This section provides, in substance, that if any person having knowledge of the commission of an act of treason shall conceal it, or not make it promptly known to the proper authority, he shall be liable to punishment by fine and imprisonment. The section is so clear in its terms as to render any comment unnecessary. It will be obvious to you that the concealment of treason may

involve the most serious consequences to the public, and, on sufficient proof, should be visited with the severest penalty of the law.

It is my duty also to call your attention to two other acts of Congress, passed at the recent special session of that body, the provisions of which have some connection with the present state of our national affairs. The first to which I shall refer is the act approved August 6, 1861, which provides, "That if any person shall be guilty of the act of recruiting soldiers or sailors in any state or territory of the United States, to engage in armed hostility against the United States, or who shall open a recruiting station for the enlistment of such persons, either as regulars or volunteers as aforesaid, he shall be guilty of a high misdemeanor, and upon conviction in any court of record, having jurisdiction of the offense, shall be fined a sum not less than two hundred dollars, nor more than one thousand dollars, and confined and imprisoned for a period not less than one year nor more than five years." The second section subjects the person enlisted to a fine of one hundred dollars and to imprisonment, not less than one year nor more than three years.

In reference to this statute, I may remark, it seems to have been the view of the Congress by which it was enacted, that recruiting or enlisting soldiers or sailors for the service of the enemy, or opening a recruiting station for that purpose, or the act of being enlisted, were not treasonable within the law of 1790, and that further legislation was therefore needed to warrant their punishment.

It is also proper to call the attention of the grand jury to another statute, approved the 31st of July last, "to define and punish certain conspiracies." This statute has but one section, which provides, "That if two or more persons within any state or territory of the United States shall conspire together to overthrow or put down, or to destroy by force, the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States, against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or

holding any office or trust or place of confidence, under the United States; each and every person so offending shall be guilty of a high crime." The punishment is by fine not less than five hundred and not more than five thousand dollars, or by imprisonment not less than six months nor more than six years, or by both fine and imprisonment.

The jury will notice that this statute punishes a conspiracy by two or more, to do any of the unlawful acts which it specifies. Under the act of 1790, defining and punishing treason, it has been held by the courts, that to conspire to overthrow the government, or to do any hostile act against it, did not invoke the crime of treason, unless there was an attempt to consummate the treasonable act. Hence the necessity of the late statute, to meet the case of a treasonable conspiracy. And it is perhaps to be regretted that this provision had not been a part of the act of 1790. With such a provision of law, properly enforced, there is reason to believe many persons who have been prominent in our national affairs, and once high in the confidence of the people, would have been the subjects of its penalties; and thus the great rebellion now in progress may have been prevented.

It may also be worthy of the notice of the grand jury, that by the act just referred to, it is declared to be a crime to conspire "by force to prevent, hinder, or delay the execution of any law of the United States." For many years a law has been in force, affixing punishment to any forcible opposition to the execution of an act of Congress, but a mere conspiracy for that purpose was not criminal until the passage of the act of last July. There can be but little doubt, that if the provisions referred to had been earlier in force, it would have subjected to deserved punishment some individuals who were parties to unlawful conspiracies, but who directly avoided any active participation in executing their purposes, and who were not therefore within the reach of the law.

It does not occur to me that there are any other statutory provisions, having any direct bearing on the present state of our national affairs, or your duties in connection with the conflict now in progress, to which it is necessary to call your attention. It is a time when grand jurors should be vigilant and faithful in the discharge of their duties. Every loyal citizen,

whatever may be his position or place in the community, is required to stand up fearlessly in defense of the government. It can not be disguised or concealed that our once happy and united country is encompassed by perils that must excite the deep solicitude of every patriotic heart. We are called upon to confront and put down a rebellion of formidable aspect and dimensions, and which for the unmitigated atrocity of its designs, and the madness and infatuation of those who began, and are now engaged in it, has no parallel in history. Its object is no less than the total subversion of a government devised and founded by the far-reaching wisdom of our fathers, in every part of the structure of which they have legibly inscribed their deep devotion to the great principles of constitutional liberty, and evinced a philanthropy co-extensive with the whole human race. And rightly administered, the constitution they have given us is suited to promote, beyond any ever devised by mere human intelligence, the happiness and prosperity of those who live under its benign sway. It is truly gratifying to know that among the citizens of the loyal States, as also in the minds of many of those now in rebellion, there is a prevalent conviction that the preservation of a government founded in such a spirit and for such exalted purposes is worth every conceivable sacrifice. And there is the most unmistakable indications of an unalterable determination to perpetuate it, in its integrity and purity, at every hazard. With this wide-spread and elevated patriotic feeling, and steadfast devotion to the Union, we are hopeful for the future of our country. We may meet with reverses, and be called upon to endure many fiery trials, but we can not doubt that these will be met with heroic firmness and a unity of purpose altogether invincible. There is nothing extravagant in the belief that, though dark clouds now hang upon our horizon, we may look forward to a time when the present rebellion shall be effectually suppressed, and the government ordained and established by our patriotic fathers shall come out of the conflict, not only uninjured, but strengthened and purified by the trial to which it has been subjected, and with an increased capacity for extending and multiplying the blessing it has already so largely conferred. But the occasion is not suitable for an extended discussion of our national affairs. I have adverted thus briefly to the subject for the sole purpose of reminding you of the solemn responsibility resting on you as grand

jurors, in the present crisis of the country, and of exhorting you to a careful inquiry into any charges which may be brought to your notice, involving the crime of treason or any of the kindred offenses to which I have referred. I shall not detain you with a reference to the specific accusations which you may be required to investigate. While in the discharge of your duties you will be impressed with the necessity of due vigilance; it will be equally obvious to you that you should act with a proper measure of caution and deliberation. Treason is justly considered the highest crime against society. Having for its object an assault by violence on the government, and thus to effect its overthrow, it may imperil the happiness and lives of millions. The crime is, therefore, odious in the view of those who are thus liable to suffer as the result of its perpetration. The mere suspicion of guilt often brings down upon its object a strong feeling of public indignation, attended perhaps with the most serious consequences to the suspected person.

Such results are not uncommon when there is a high state of excitement in a community. Facts may be misrepresented, or so distorted, as to induce this suspicion without any real cause; or a vindictive personal enemy may fabricate statements to the prejudice of another for the base purpose of bringing odium upon him. Thus, it may happen that a citizen of the purest character, and the most patriotic heart, may be a grievous sufferer. Let me, therefore, suggest to the grand jury, that in their investigation of charges involving the high crime of treason, they should carefully exclude from their minds all influences originating in mere popular excitement or which may be supposed to be the result of personal enmity. If, after a calm inquiry into the facts, the jury believe that the accused person is guilty of treason, they ought not to hesitate in returning a bill according to their convictions, whatever may be the result to the party implicated. But in regard to treason, and indeed all other crimes, the jury should reach a rational conclusion, from the law and the evidence, that the person accused is guilty, before returning a true bill against him.

A grand jury has only the evidence which the government can adduce, without reference to what the defendant may have it in his power to bring forward, in proof of his innocence. They ought, therefore, to be able to say under the solemnity of their oaths, that there is reasonable ground for the inference

of guilt. And, as before intimated as to all crimes, it must appear that the act charged was committed within the limits of the Southern District of Ohio. If treason is the crime charged, there must be a distinct allegation in the indictment of the overt act or acts; and although a grand jury return a true bill for this crime, there can be no conviction unless an overt act is proved by two witnesses. And it may well be doubted, whether it is expedient to indict for this crime in cases where it is certain the evidence required by law can not be produced before a traverse jury, and where consequently there can be no conviction.

Remarks of Judge Leavitt on the Death of President Lincoln, addressed to the Grand Jury for the April Term, 1865, of the United States Circuit Court.

GENTLEMEN: Before calling your attention to the immediate duties of your position as grand jurors, I can not refrain from some brief remarks upon the peculiar circumstances under which you are now impaneled. I refer especially to the fact, that but a few days since the President of the United States lost his life by the hand of a fiendish assassin. This foul deed has plunged the people into the deepest grief. Since the days of Washington, no President of the United States enjoyed a larger measure of public confidence, or had won a higher place in the affection of all loyal hearts than Abraham Lincoln. If not the *first*, it may be truly said he is second in the hearts of his countrymen. But this is not the place, or the occasion for a labored eulogy upon the man whose loss we deplore. This duty will be discharged by others in a sphere more appropriate to such a theme. My present purpose is to call the attention of the grand jury to the instructive commentary upon our admirable institutions, afforded by the sad incident referred to. We have lost a president who had "filled the measure of his country's

honor," but we have not lost our government. To-day its machinery is in perfect order, and is successfully carrying out the beneficent ends of its creation. The arm of rebellion is lifted up against it, but that arm has been stricken down by the patriotism of the people and the invincible heroism of our armies. The bloody work of the assassin has also failed to move its stable foundations, or to stay or check its onward movements. In the monarchical and imperial governments of the old world, the assassination of the sovereign would result in civil commotion and most probably in a bloody revolution. But our excellent constitution has so provided for the contingency of the death of the chief magistrate, that it is hardly within the range of possibilities that there can be any other than a very brief vacancy in the office. This was beautifully exemplified in the events of the last few days. On last Saturday morning Abraham Lincoln was removed by death from his office and from the scenes of earth; but in a few brief hours, Vice-President Johnson was constitutionally invested with all the powers pertaining to it, and had assumed all the responsibilities of that high position. And we have in these facts, the most convincing proof that our government, founded under God by the wisdom and sagacity of our fathers, is adapted to meet any emergency, and can not be overthrown by any force, internal or external, so long as the people are true to themselves and to the best interests of the race.

And I can not here forbear the brief remark, that at no time since our great republic was founded, have our people more reason to rejoice in their birthright as American citizens than at the present juncture. The last four years will constitute an historic period in the progress of the nation, of which our posterity will be proud in all coming ages. But I may not enlarge on this theme. We all have now the assurance that we have a country, and that we have a government based upon the intelligence, virtue, and patriotism of the people, which, while it affords the highest security for our liberties and all just rights, has the power to defend itself against all assailing foes. Let us appreciate it all the more highly that it has safely passed through the fiery trial of a most formidable rebellion. The sacrifice has been great, but may we not hope that the benefits and blessings to result will more than compensate for all the cost.

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ADMIRALTY—

1. During a high stage of water in the Ohio river, a descending boat should keep near the middle of the river, without any regard to the channel. *Keys v. Ambassador*, 237.
2. A descending boat on the Ohio river, two hundred yards from the Indiana shore, has no right to signal by one tap of the bell, and attempt to take the starboard side of another boat near that shore. *Ib.*
3. The rule requiring the up-stream boat to give the first signal to indicate its choice of sides, does not apply when there is eighteen feet of water above the bars. *Ib.*
4. The second rule of navigation adopted by the board of supervising inspectors, under the steamboat law of 1852, giving an ascending boat the right to choose the side she prefers to take, when meeting a down boat, must have a reasonable construction, and can not be understood as giving the up-stream boat a right under all circumstances of choosing her line of navigation. *Thorp v. Steamboat Defender*, 397.
5. If an ascending boat is coming up on one shore, and a down boat is seen above on the opposite side, the river being wide, with an ample depth of water in the intervening distance between the boats, and the up-stream boat is not required for business purposes to make a crossing, she ought, by one sound of the whistle, to signify her purpose of keeping up the same side. She has no right unnecessarily or capriciously to require the descending boat to change her course. *Ib.*

 Agency.

ADMIRALTY—Continued.

6. It is a sound rule of navigation applicable to the western rivers, recognized by courts exercising admiralty jurisdiction, that an ascending boat should not cross a channel when a descending boat is so near that it would be possible for a collision to occur. *Ib.*
7. A descending boat has a right to the channel of the river, and, while in her proper place, it is the duty of the ascending boat so to regulate her movements as to keep out of the way. *Ib.*
8. It is a great error, and one which must always incur hazard of a collision, for an ascending boat to attempt to cross the bow or in front of the descending boat, unless the distance between them is such as to exclude the possibility of their coming in contact. *Ib.*
9. An up-stream boat, wishing to cross a channel when a boat is coming down, must either slacken her speed or stop altogether until the down boat has passed, and this rule is not affected by the fact that the signals between the boats give the ascending boat the choice of sides; for it is a paramount rule of navigation that, if possible, collisions must be avoided, and an error by one boat will not justify another in running into her unless it is unavoidable. *Ib.*
10. A boat astern attempting to pass one that is ahead, is held to stricter vigilance and greater precaution than are required of the latter. *McGrew v. Steamboat Melnotte*, 453.
11. The boat ahead is under no obligation to give way or to change her course to facilitate the passage of the boat which is astern, and the latter, having a choice of the time and place to pass, incurs all the risk of the attempt. *Ib.*
12. This principle applies with great force and stringency when the boat making the attempt to pass is lightly laden and easily controlled, and the other is moved with difficulty. *Ib.*
13. By the well-established rules of navigation on the western rivers, an ascending boat has the right to indicate a preference as to her course of navigation, and having done so, the descending boat is bound to conform to her choice as indicated by her signals, unless there are circumstances rendering it improper to do so. *Western Ins. Co. v. Steamboat Goody Friends*, 459.
14. If there are such circumstances, it is the duty of the descending boat so to indicate, that the other boat may be navigated accordingly. *Ib.*

See COLLISION; DAMAGES; PRESUMPTIONS; SALVAGE; FREIGHT;
JURISDICTION; PROCEEDS; CONTRACT; EVIDENCE; LIEN; MA-
TERIAL-MEN.

AGENCY—

1. A letter from a part owner of a steamboat, requesting the person addressed to advertise the interest of the writer for sale, and in thus ad-

Amnesty—Certificate.

AGENCY—Continued.

vertising to act as his agent, confers no authority to sell, and a sale under it is a nullity. *Thurston v. Steamboat Magnolia*, 92.

2. If such part owner, with a knowledge of the terms of the sale, and with due deliberation, adopts and affirms it, it is obligatory on him to the extent of his interest, and he can not afterward disaffirm the ratification. *Ib.*
3. A power of attorney is not operative till received and accepted by the agent, and a power to sell for cash does not authorize a sale on credit. *Ib.*

AMNESTY. See PARDON.

ASSIGNMENT—

1. In Ohio, a failing debtor may prefer creditors by assignment or otherwise, if done under circumstances which repel the inference of a fraudulent purpose. *Coolidge & Dubarrow v. Curtis*, 222.
2. The Supreme Court of Ohio have decided that the act of March 14, 1853, "declaring the effect of assignments to trustees, in contemplation of insolvency, and the statute of 1838, of the same import, do not affect assignments or transfers made for the sole benefit of the assignees or transferees; but if made trustees for other parties, the statute applies, and the property is held for the equal benefit of all the creditors." *Ib.*
3. But no trust will be implied merely from the fact that an assignment or transfer has been made by an insolvent debtor to indemnify a surety for such debtor, if no more property has been assigned than was necessary for that purpose, and the facts warrant the presumption that nothing was designed but the *bona fide* indemnity of the surety. *Ib.*
4. Although such surety may be liable to respond to the creditors not provided for, for any surplus after paying the debts for which he was bound, he is not a trustee within the contemplation of the statute referred to. *Ib.*

See DEBT AND DEBTOR; LIEN; PARTIES.

AUTHORITY. See TERRITORIAL GOVERNMENT.

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CERTIFICATE. See RECOGNIZANCE.

 Character—Commercial Intercourse.

CHARACTER—

Proof of the previous good character of the defendant, and that without compulsion he sought an investigation of the charge is not only admissible, but should have weight with the jury if the evidence implicating him creates a reasonable doubt of his guilt. *United States v. Crow*, 51.

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CITATION. See **LIS PENDENS**.

CITIZEN—

1. The plaintiff, having left Cincinnati in 1856, with the purpose of permanently residing in Chicago, and having resided there till 1859, in the meantime exercising the right of voting in Illinois, was a citizen of that State in 1858, when this suit was brought, and had a right to sue in this court, though he afterward returned to Cincinnati. *Blair v. Western Female Seminary*, 578.
2. The fact, that his wife and younger children remained at Cincinnati did not, under the circumstances of this case, prevent the plaintiff from becoming a citizen of Illinois. *Ib.*

COLLISION—

1. In a suit for collision, to entitle the libellant to a decree for full damages for the injury, it must appear not only that the respondents' boat was in fault, but that the libellants' boat committed no error which contributed to the collision. *Schenck v. Steamboat Fremont*, 57.
2. An up-going boat has a right to choose which side of the down boat she will take, and to signal accordingly, but has no right to insist on this rule when its observance will render a collision probable. *Ib.*
3. As a general rule, the proper place of a down boat is in the main channel. *Ib.*
4. It is a paramount law of navigation that a collision must be avoided when it is practicable to avoid it. *Western Insurance Co. v. Steamboat Goody Friends*, 459.

See **PRESUMPTIONS**; **ADMIRALTY**; **FAULT**; **PARTIES**.

COMMISSIONS. See **OFFICER**.

COMMISSIONER—

A commissioner for Ohio and Indiana, appointed by the Circuit Court of the United States in Indiana, to take depositions in a case pending in said court, has authority to administer an oath under the laws of the United States. *United States v. Coons*, 2.

See **EXAMINING COURT**.

COMMERCIAL INTERCOURSE—

1. By the law of nations where a war exists between two distinct and independent powers, there must be a suspension of all commercial

Compensation—Contract.

COMMERCIAL INTERCOURSE—Continued.

intercourse between their citizens; but this principle has not been applied to the States which joined the so-called Southern Confederacy. *United States v. Six Boxes of Arms*, 446.

COMPENSATION. See **SALARY**; **SALVAGE**; **MARSHAL**; **OFFICE AND OFFICER**.

CONFESSIONS—

Confessions of a prisoner should be cautiously received. *United States v. Coons*, 2.

CONSTITUTIONAL LAW—

1. The seceding ordinances of a portion of the States did not abrogate the constitution of the United States, or release the citizens of any State from their obligation of loyalty to the government of the United States, and a citizen or resident of any State may therefore be indicted and punished for treasonable acts against that government. *United States v. Cathcart*, 556.
2. The government of the United States is not a compact between the several States, from which any State may withdraw at pleasure, with or without cause. *Ib.*
3. The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but, as the preamble emphatically declares, by the *people* of the United States; and the government of the Union emanates from the people, and is a government for the people. *Ib.*
4. The government of the Union, though limited in its powers, is supreme within its sphere of action, and laws passed pursuant to the constitution, form the supreme law of the land. *Ib.*

CONSIDERATION. See **FRAUD**.

CONSTRUCTION—

1. In the construction of a State law, this court is bound to adopt the views of the Supreme Court of the State. *Stapp v. Steamboat Swallow*, 189.
2. If the construction of a State statute has been settled by the decision of the highest court of the State, the courts of the United States uniformly adopt such construction. *Coolidge v. Dubarrow*, 222.

CONTEMPT. See **DECREE**.

CONTRACT—

1. A contract, made between the masters of two steamboats, providing for the exchange of certain barges, and stipulating, among other things, that the two boats "shall have the use of each other's barge until such time as they can meet and exchange barges, without injury or loss to either party," must have a reasonable interpretation. Slight loss or inconvenience would not justify either in a refusal to

 Contraband of War—Copyright.

CONTRACT—Continued.

- exchange; but each party is entitled to a reasonable time to make the necessary arrangements for an exchange. *Scott v. Steamboat Dick Keyes*, 164.
2. Where the intention of the parties is sufficiently apparent from the terms of a written contract, and there is no ambiguity, either latent or patent, it is clearly inadmissible to give parol evidence in explanation of the agreement. *Ib.*
 3. Under a contract for the delivery of nine thousand tons of railroad iron, the contract is not complied with on the shipment of the iron. *Thompson v. C. and Z. Railroad*, 152.
 4. Where five hundred and ninety tons of iron, shipped under such a contract, were lost at sea, the risk of the transportation was on the seller. *Ib.*
 5. In estimating the loss of the purchaser, by reason of the non-delivery of the iron thus lost, the rule of damage is the difference between the contract price and the market value at the time and place of the delivery. *Ib.*
 6. Where it is stipulated in a contract that certain acts are to be done or omitted, and the contract is of such a nature that the actual damages of non-fulfillment are susceptible of computation in money, and a sum is named in the contract as a penalty or forfeiture for a violation, it is to be viewed as a penalty, and not as liquidated damages, and in such case the actual damages sustained will constitute the rule of recovery. *White v. Arleth*, 319.
 7. A contract free from ambiguity in its terms must be viewed as the exponent of the intention of the parties to it, and can not be varied or contradicted by extrinsic evidence. *McNamara v. Gaylord*, 302.
 8. Where one party to a contract agrees to do an act at a time specified, in consideration of which the other party is to do another act at the same time, neither party can sue for a violation of the agreement, or insist on its specific performance, without showing an offer to comply with the agreement, or a sufficient excuse for not doing so. *Ib.*

See **STATUTE OF FRAUDS; SALVAGE; SURETIES; DAMAGES.**

CONTRABAND OF WAR—

The destination of arms and munitions of war, and the use intended to be made thereof, at the time of seizure, must furnish a test of their status as contraband or otherwise. *United States v. Six Boxes of Arms*, 446.

CONVEYANCE. See **FRAUD.**

COPYRIGHT—

1. The chart copyrighted to the complainant's wife, as published on a single sheet, containing diagrams representing a system of taking measures for, and cutting ladies' dresses, with instructions for its

Costs—Credits.

COPYRIGHT—Continued.

practical use, is a *book* within the meaning of the first section of the act of Congress of February 3, 1831, and is entitled to the protection of the statute. *Drury v. Ewing*, 540.

2. In deciding whether a publication is an infringement of one for which a previous copyright had been obtained, the true inquiry is, whether the work alleged to be a piracy is substantially the same as that copyrighted; and mere colorable variations, intended to evade liability for an infringement, will not destroy the legal identity of the two. *Ib.*
3. If a material part of the copyrighted publication is used, though the alleged piratical work may be in some respects an improvement, it is still an infringement of the exclusive right of the author. *Ib.*
4. The substantial identity of the system of the defendant's wife with that copyrighted by the complainant being established by the evidence, the former is adjudged guilty of a violation of the injunction in using and selling her guide, and is ordered to surrender all the copies in her possession or within her control, as also the plate on which it is printed, to the clerk of this court, within twenty days, and to pay the costs of this proceeding. *Ib.*

COSTS—

1. Where a judgment was entered for a plaintiff, with costs, the court will not, at a subsequent term, revise or correct it as to the costs; though being for less than \$500, the plaintiff was not entitled to such judgment. *Crabtree v. Ex'rs of Wm. Neff*, 554.
2. A retaxation will not be ordered, on the ground that the clerk has not discriminated between the costs of the plaintiff and those of the defendant. *Ib.*
3. The practice of taxing the entire cost to the losing party, without discrimination, has always prevailed in this court; and, until otherwise provided by law or obligatory rule of court, will not be changed. It is, prescriptively at least, the law of this court. *Ib.*

COUNTY COMMISSIONERS. See PATENTS AND PATENT LAW (*Infringement.*)

COURTS. See JURISDICTION; PROCESS; HABEAS CORPUS; PRACTICE; EXAMINING COURT.

CREDITS—

Where the evidence proves, to the satisfaction of a jury, in a suit on the bond of a disbursing officer, that money, reasonable in amount, was paid by such officer, and services were rendered by him in good faith, in the proper discharge of his official duties, such payment and service, if not prohibited by law, may be allowed as credits. *United States v. Corwin*, 149.

See TREASURY DEPARTMENT; TERRITORIAL GOVERNMENT; EVIDENCE.

 Creditors—Decree.

CREDITORS. See FRAUD; EQUITY.

CRIMES. See EVIDENCE; INDICTMENT; HABEAS CORPUS; PERJURY; RECOGNIZANCE; MAIL; NEUTRALITY; EXAMINING COURT; JURISDICTION; TREASON.

DAMAGES—

1. Where there is mutual fault, by the well-settled rule of maritime law, there must be a division of the damages; and such is the decree in this case. *Schenck v. Steamboat Fremont*, 57.
2. In this case, the flat-boat was laden with flour in barrels, destined for New Orleans; as the result of the collision, the flour was submerged in water for several hours, and injured thereby; the master of the flat-boat, having repaired his boat, reshipped the flour on the same boat for New Orleans, where it arrived after a passage of three weeks, and was there sold at a great loss from its damaged condition; and as the collision occurred only sixty miles below Cincinnati, to which place the flour could readily have been shipped, and where it would have sold with little loss: *Held*, that the master of the flat-boat should have sent the flour to Cincinnati for sale, that being the nearest and best market; and that the owners of the steamboat, adjudged guilty of fault in the collision, are liable only for the actual loss that would have occurred, if the flour had been shipped to and sold at that place, and not for the loss sustained by the sale at New Orleans. *Seaman & Gillespie v. Steamboat Crescent City*, 105.
3. The rule of damages for the non-fulfillment of a contract for the delivery of property, is the difference between the price at which it was agreed it should be delivered and its actual market value at the time and place of delivery specified in the contract. *White v. Arlet*, 319.
4. If a mutual fault occasions a collision, the damages for the injury must be divided between the boats; but if the fault was wholly on one side, the culpable boat must bear the entire loss. *Thorp v. Steamboat Defender*, 397.

See CONTRACT; PENALTY; VERDICT; COLLISION.

DEBT AND DEBTOR—

A failing debtor has an undoubted right to pay any debt which he justly owes, and to secure an indorser against liability, if done in good faith. *Walker v. Adair*, 158.

See ASSIGNMENT; RECOGNIZANCE.

DECREE—

On a motion for an attachment for a contempt in violating an injunction, the original decree can not be impeached, except for fraud, or defect of jurisdiction in the court, as to the subject matter of the suit. *Drury v. Ewing*, 540.

Dedication—Equity.

DEDICATION—

1. To constitute a valid dedication of property to public use, there must be not only an intention to dedicate, but an act manifesting such intention. *Robertson v. Town of Wellsville*, 81.
2. The law is liberal in its spirit and policy in regard to appropriations of property for public use, and requires no particular formality to give them validity. *Ib.*
3. A dedication may be established by proof of verbal declarations, or by a written instrument, and, under some circumstances, it may be presumed from a long continued acquiescence of the owner in the use of the property by the public; but such presumption does not arise where such user is by the license of the owner, and not adverse to the title asserted by him. *Ib.*
4. There may be a good dedication of property to a public use, without a divestiture of the fee of the owner. *Ib.*
5. Verbal declarations of the owner, that he had surrendered the control of the landing, or beach of the river, to the municipal authorities of a town, temporarily, and for a reason specified by him, do not import a legal dedication to the public. *Ib.*
6. Evidence of continued claim of title, and the exercise of acts of ownership over the property, by the person claiming title, may be conclusive to rebut a presumption of a dedication to the public. *Ib.*
7. The consent of the owner of land to the construction of a road upon it, for his own and the public use, does not make out a valid dedication. *Ib.*

DEED—

Evidence of the execution and contents of a quitclaim deed, alleged to have been executed many years before the commencement of the suit, and which was never put on record, and never heard of or seen by those who might be supposed to be cognizant of it, at the time of its alleged execution, or those officially charged with its custody afterward, should be received with great caution. *Robertson v. Town of Wellsville*, 81.

DEFENDANT. See PROCESS; PARTIES.

DISBURSEMENT. See OFFICE AND OFFICER; CREDITS.

DISTRICTS. See PARTIES.

DOMICILE. See CITIZEN.

ENROLLMENT. See EVIDENCE.

EQUITY—

INJUNCTION.

1. A chancellor in the exercise of a just discretion, upon an application for an injunction, may properly take into consideration the existence

Equity.

EQUITY—Continued.

of an actual conflict or imminent danger of a violent collision between two authorities, in determining the expediency of awarding this preventive process. *Crane v. McCoy*, 422.

JURISDICTION.

2. It is not enough to defeat jurisdiction in equity that there was a remedy at law; the remedy must be complete, prompt, and efficient. *Crane v. McCoy*, 422.
3. If the rights of a party can only be enforced at law by long continued, strenuous, and expensive litigation, and those rights can be more promptly and efficiently asserted in equity, a stringent reason is offered for the application of its power. *Ib.*

PLEADING AND PRACTICE.

4. A demurrer to a bill in equity will be sustained on the ground of the staleness of the claim of title set up to land, when it appears by the averments of the bill that the complainants have slept upon their rights from the year 1810 until the year 1859. *Copen v. Fleisher*, 440.
5. Where such complainants file an amended bill, alleging that for a long time after their rights accrued they were minors, residing in different parts of the State of Virginia, and had no knowledge of their rights, nor the location of the land, until about the year 1841, and were unable, until some time after that year, to take any steps in the assertion of their rights, such allegations are sufficient to relieve the claim of title of staleness, and to put the complainants on proof of their allegations in that regard. *Ib.*
6. A bill in equity, praying that the equitable title to land may be adjudged to be in the complainant, and that he is entitled to a patent, and also that a certain person may be made a defendant to the bill, and may be compelled to disclose the nature of his claim to the land, and by what authority he is in possession, and to account for rents and profits, is liable to the objection of multifariousness in seeking to obtain two distinct objects by the same decree. *Ib.*
7. In chancery, no material fact which has accrued since filing the original bill can be introduced in an amended bill, and a party can only avail himself of such fact by filing a supplemental bill. *Ib.*
8. Where such new matter is introduced in an amended bill, it is a cause of demurrer. *Ib.*
9. The complainant in a bill in equity is not required to set out all the minute facts of his case; the general statement of a precise fact is usually sufficient. *Dunham & St. John v. Eaton and Hamilton R. R. Co.* 492.

Evidence.

EQUITY—Continued.

10. Where a bill in equity distinctly alleges that the defendants subscribed stock for the express purpose of constructing a branch railroad called the Eaton and Piqua Branch, and are liable in equity to account to the complainants therefor, such statement embraces facts which constitute the right of complainants to enforce the claim asserted by them, and it is not necessary for the defense that the bill should state all the particulars of the subscription, including the amount subscribed and due by each one. *Ib.*
11. Where a receiver has proceeded, under a decree in favor of complainants, to reduce into his possession the property or assets of the defendants, the complainants can not call on the defendants for a disclosure by means of a supplemental bill. *Ib.*

TRUSTS AND TRUSTEES.

12. The law is well settled, that a person occupying the position of a fiduciary can not be a purchaser of the trust property, even in the absence of any ground for the presumption of actual fraud. *Shakelley v. Taylor*, 142.
13. Where three persons were administrators of an insolvent estate, and had obtained an order from the probate court for the sale of the decedent's land to pay debts, and at the sale a note was taken for a part of the purchase-money, payable to the administrators, upon which suit was brought, judgment obtained, and the property offered for sale by the sheriff on execution, and at the sale one of the administrators became the purchaser at two-thirds of the appraisement: *Held*, that such administrator did not occupy a fiduciary relation to the land, and that the sheriff's deed vested a good title in him. *Ib.*
14. If the purchaser could be viewed on any ground as a trustee, under the facts of this case, the creditors of the insolvent decedent, and not the heirs, would be the proper persons to impeach the sale. *Ib.*

See ASSIGNMENT.

EVIDENCE—

1. The proper evidence of the pendency of a suit is the record of the court. *United States v. Coons*, 1.
2. Proof of declarations made by a defendant is admissible to explain or determine the character of acts ambiguous or unintelligible. *United States v. Lumsden*, 5.
3. Written and printed evidence containing no proof of an overt act, in violation of section 6 of the act of April 20, 1818, is admissible as confessions and declarations, and to such evidence the rule applies that those parts which admit of an interpretation favorable to defendants must be considered as well as those justifying the implication of guilt. *Ib.*

Evidence.

EVIDENCE—Continued.

4. On the trial of an indictment for abstracting a letter or package from the mail, the most satisfactory evidence that it had been in the mail is that of the person who deposited it in the post-office; and of its loss, that of the person to whom it was addressed, to the effect that it was never received by him. *United States v. Cross*, 51.
5. In the absence of any direct testimony connecting the defendant with the violation of the mail, collateral circumstances tending to his inculcation are admissible in evidence to the jury. *Ib.*
6. Evidence having been introduced showing that a letter had been mailed at Carlisle, in the State of Pennsylvania, addressed to parties in Ohio, inclosing a draft or bill, the prosecution, for the purpose of proving that the draft or bill had been in the defendant's possession, and to raise the presumption that he had stolen it from the mail, offered in evidence a letter purporting to have been written and signed by Martin Smith, transmitting the draft or bill to a banker in Marietta, Ohio, to be cashed, and proposed to prove by a witness that said letter was in the handwriting of the defendant, and the witness stated that it was his impression and belief that the handwriting of the letter, including the signature of Martin Smith, was the proper handwriting of the defendant; but having sworn that he had never seen the defendant write but once, and had no other means of knowing his handwriting, the court instructed the jury that the proof of the handwriting was not sufficient, and would not justify a verdict of guilty. *Ib.*
7. In a suit by the United States to recover a balance due on the books of the treasury department, the defendant can not give in evidence, as a set-off, a claim against the government which has not previously been presented to, and disallowed by, the proper accounting officer, without proving that it was not before in his power to produce the voucher for such claim, and that he was prevented from exhibiting it "by absence from the United States, or some unavoidable accident." *United States v. Smith*, 68.
8. Treasury transcripts, showing the state of accounts as between the government and a disbursing officer of the United States, are *prima facie* evidence, and admissible as such in a suit against the officer or his sureties on an official bond. *United States v. Corwin*, 149.
9. The act of Congress provides that in a suit on such bond no item of credit shall be allowed, unless it has previously been submitted to and disallowed by the proper accounting officers. *Ib.*
10. But it is competent for the officer or his sureties to prove that a disputed item of credit claimed had been thus presented and disallowed, although the treasury transcript does not show such presentation and rejection. *Ib.*

Examining Court—Fault.

EVIDENCE—Continued.

11. The place of enrollment is not conclusive as to the home port of a vessel or boat, and evidence is always admissible to prove the actual residence of the owner, and such evidence furnishes the test of the character of the boat as foreign or domestic. *McAllister v. Steamboat Kirkman*, 369.

See CONTRACT; CREDITS; CHARACTER; DEDICATION; DEED; SALVAGE; NEW TRIAL.

EXAMINING COURT—

An examining court or judge will not require clear and indubitable proof of the guilt of accused parties to justify an order that they shall answer further to the charge made against them. *United States v. Lumsden*, 5.

EXAMINING ORDER. See LIS PENDENS.

FAULT—

1. It is a paramount law of navigation that collisions are always to be avoided when it is practicable to do so, and the fact that one boat is in fault, will not justify another in the infliction of an injury that could have been avoided by the observance of proper skill and care. *Mills v. Steamboat Holmes*, 352.
2. In determining the question of fault with the view to the ascertainment of liability for an injury, the proximate cause of the injury must be regarded. *Ib.*
3. To entitle the libellants to indemnity for their loss, they must not only show that their adversary is in fault, but that in the management of their boat there was no material error to which the collision can be charged. *McGregor v. Steamboat Melnotts*, 453.
4. The absence of a competent and vigilant watch, constantly employed to assist and advise the pilot in his duty is *prima facie* evidence of fault in the boat thus deficient. *Ib.*
5. The errors and faults of one boat will not justify another boat in the infliction of an injury to her, unless it was the result of an inevitable necessity. *Western Insurance Co. v. Goody Friends*, 459.
6. In a case arising from a collision of boats, it is not enough to relieve from an imputation of fault that there was a pilot in the wheel-house, but there must be some one on deck, charged with the special duty of keeping a vigilant lookout, not in the wheel-house, but on the forward part of the deck, where the best opportunity is offered for observing approaching and passing boats, and who will be able to communicate promptly to the pilot such information as he may need to insure the safety of his boat. *Ib.*
7. The absence of such lookout justifies a *prima facie* presumption of fault, and makes it incumbent on the party against whom the pre-

Fees—Fraud.

FAULT—Continued.

sumption arises, to repel it by clear proof that the fault was on the other side. *Ib.*

See COLLISION; PRESUMPTIONS; DAMAGES.

FEEES. See MARSHAL; OFFICE AND OFFICER; SALARY; WITNESSES.

FRAUD—

1. A conveyance of real estate, by a debtor, is clearly fraudulent, if, at the time of its execution, no consideration is paid and no security or evidence of indebtedness is taken. *Alexander v. Todd*, 175.
2. Such a conveyance is also impeachable on the ground of the falsity of an admission contained in it, that the whole amount of the consideration had been paid. *Ib.*
3. The presumption of fraud, arising from the non-payment of the consideration and the failure of the vendor to take from the vendee any evidence of indebtedness for the property sold, may be rebutted, if subsequently, and in pursuance of the understanding of the parties at the time the deed was executed, the consideration is paid in good faith. *Ib.*
4. Proof that a full consideration for the property sold was paid, does not decisively negative the presumption of fraud, for the intention of parties, and not the fact of payment, is the test by which the transaction is to be judged. *Ib.*
5. A transfer of property, with an intent to defraud or defeat creditors, will be void, although there may be, in the strictest sense, a valuable and adequate consideration. *Ib.*
6. Possession of land, and receipt of the profits after an absolute conveyance, is evidence of fraud, unless such possession be consistent with the terms and objects of the deed or the character of it be openly and explicitly understood. *Ib.*
7. It avails nothing that the parties to a sale insist or swear that it was made in good faith, if their declarations are outweighed by the facts and the necessary inference of law. *Ib.*
8. Where defendants are apprised, by a bill in equity, that a deed executed by them is to be impeached, it is incumbent on them to contradict and explain every fact tending to cast suspicion on it. *Ib.*
9. The question of fraud is one of law and fact. The court declares what constitutes a legal fraud, and it is for the jury to say whether the evidence proves the fact of fraud. *Parrish v. Danford*, 345.
10. In Ohio, a man may, under some circumstances, prefer one creditor to another, if it is done in good faith, and no fact appears from which a fraudulent intent can be inferred. *Ib.*
11. No man, knowing himself to be insolvent, can make a valid disposition of his property, except for the benefit of creditors. *Ib.*

 Freight—Habeas Corpus.

FRAUD—Continued.

12. If there has been a delivery of property and full payment made in good faith, the right of the purchaser will not be interfered with; but if the purchaser has notice of a fraud before getting possession and making payment of the consideration, the creditors may intervene and the contract will be set aside. *Ib.*
13. If the parties to a sale and purchase of property intend thereby to defraud creditors, the fact that a full consideration was paid will not make it valid. *Ib.*

FREIGHT—

After a cargo is shipped, the shippers can not demand it short of the port of destination without payment of full freight for the voyage.
Seaman & Gillespie v. Steamboat Crescent City, 105.

GOVERNOR. See **SALARY.**

GOVERNMENT. See **CONSTITUTIONAL LAW.**

HABEAS CORPUS—

1. The first clause of section 14 of the judiciary act of 1789, which provides that the Supreme, Circuit, and District Courts of the United States "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," does not authorize said courts to issue a *habeas corpus*, unless it is necessary in aid of jurisdiction, in a case or proceeding there pending. *Ex parte Everts*, 197.
2. The case of a father claiming the custody of an infant child is not one in which a *habeas corpus* can issue, by a court of the United States, as ancillary to the exercise of its jurisdiction, under the above cited clause of the act of 1789. *Ib.*
3. Nor can a Circuit Court of the United States take jurisdiction under section 11 of the act of 1789, although the father is a citizen of another State, as the matter in dispute has no pecuniary value, and can not be estimated in money. *Ib.*
4. Section 7 of the act of Congress of March 2, 1833, authorizes, any judge of the United States to issue the writ of *habeas corpus* where an officer of the United States is imprisoned "for any act done, or omitted to be done, in pursuance of a law of the United States." *Ex parte Robinson*, 39.
5. It is the proper remedy where a marshal is imprisoned by the sentence of a State judge, as for a contempt in not producing the bodies of certain persons named in a writ of *habeas corpus* issued by such judge, and if it appears from the evidence that such persons were

Handwriting—Indorsement.

HABEAS CORPUS—Continued.

legally in the custody of the marshal, pursuant to the provisions of the fugitive slave act, and that his refusal to produce them before the State judge was a paramount duty by the terms of the said act, the marshal is entitled to his discharge under said section 7 of the act of 1833. *Ib.*

See JURISDICTION.

HANDWRITING. See EVIDENCE.

HEIRS. See EQUITY.

HOME PORT. See LIEN.

INDICTMENT—

Any discrepancy between what the defendant swore to, and what is set out in the indictment as having been sworn to by him, is fatal. *United States v. Coons*, 1.

INDORSER—

1. An accommodation indorser of a bill of exchange, who, after protest for non-payment by the acceptor, pays the bill, has a right of action against such acceptor. *Robinson v. Kilbreth*, 592.
2. In the absence of any proof of an agreement between an acceptor and the indorser of a bill, that in case of default of payment by the maker, the parties shall be liable to each other as sureties, the liability of the acceptor and indorser attaches in the order in which their names appear on the bill, and, in case of payment by the acceptor, being the person primarily liable, he has no right to contribution from the indorser. *Ib.*
3. Where there has been a series of bills drawn by a third party, on some of which the plaintiff was acceptor, and on others indorser, and on some of which the defendant was acceptor and on others indorser, and the defendant pays a bill on which he was acceptor and the plaintiff an indorser, both being accommodation parties, the defendant can not set off such payment against the plaintiff's claim for money paid by him on another bill on which the defendant was acceptor and the plaintiff an indorser. *Ib.*
4. Nor can the defendant in such case recover of the plaintiff as indorser for money paid and advanced to the drawer of the bill for plaintiff's use, without proof that the plaintiff was a party to and interested in such an arrangement. *Ib.*

See DEBT AND DEBTOR.

INDORSEMENT—

1. An indorsement on a bill of exchange of the words, "Credit my account—*James B. Scott, Cashier*," is restrictive in its character, and suspends the further transfer and negotiability of the bill. *Lee & Co. v. Chillicothe Branch Bank of Ohio*, 387.

Insurance—Jurisdiction.

INDORSEMENT—*Continued.*

2. Such an indorsement is sufficient to apprise subsequent indorsees of the bill that no authority existed authorizing a transfer to them. *Ib.*

INSURANCE. See SALVAGE; LIEN.

INTENTION. See CONTRACT; NEUTRALITY LAWS.

INTERNAL REVENUE—

1. An executor was directed to sell certain designated parcels of real estate belonging to the testatrix "and convert the same into cash," and "out of the proceeds thereof to pay any debts I may have, and the above-named legacies," and in pursuance of such provision of the will, the executor sold the property referred to: *Held*, that such legacies are not subject to the tax or duty imposed by section 111 of the internal revenue act of July 1, 1862, upon legacies arising from personal property. *United States v. Watts*, 580.
2. In limiting the scope of the law to legacies arising from personal property, the inference is irresistible that it was intended to exempt such as were payable from the proceeds of real estate. *Ib.*
3. The courts of the United States are not at liberty by construction or legal fiction to include subjects of taxation not within the terms of the law. *Ib.*
4. In a proceeding in the District Court of the United States against property seized as forfeited under the internal revenue laws, to which a claim is interposed, the claimant has a constitutional right to a trial by a jury. *United States v. One Hundred and Thirty Barrels Whisky*, 587.
5. Congress has no power by legislation to provide for any other mode of trying a case, in which the right of trial by jury is secured by the constitution. *Ib.*
6. The provision of the statute, declaring that "the proceeding to enforce said forfeiture of said property shall be in the nature of a proceeding *in rem*," is not to be construed as authorizing a trial on strict admiralty rules, and without the intervention of a jury. *Ib.*

JOINT ACTION. See PROCESS; RECOGNIZANCE.

JUDGE. See JURISDICTION.

JUDGMENT. See COSTS; LIEN.

JURISDICTION—

1. In ordering a discharge upon a habeas, a judge of the United States does not assume a jurisdiction to review or reverse the sentence or judgment of the State judge, but merely exercises a power expressly conferred by an act of Congress. *Ex parte Robinson*, 39.
2. Although the authorities are not uniform as to the right of a State judge to issue the writ of habeas corpus, where the imprisonment is under the authority of a law of the United States, it is well settled

 Jury—Legacies.

JURISDICTION—Continued.

that when the fact is proved that the imprisonment is under such authority, the jurisdiction of the State judge is at an end, and all subsequent proceedings are *coram non judice*. *Ib.*

3. The pendency of a proceeding in replevin, in a State court, by which a party claiming to be a part owner of a steamboat has obtained the possession of the boat, does not affect the jurisdiction of a court of admiralty in a proceeding by libel, in which all the parties in interest are before it. *Thurston v. Steamboat Magnolia*, 93.
4. Claims not founded on maritime liens have no standing in this court in the exercise of its admiralty jurisdiction, and will be dismissed. *Stepp v. Steamboat Swallow*, 189.
5. Where there is concurrent jurisdiction in courts, the tribunal first obtaining jurisdiction of the subject or person shall retain it. *Crane v. McCoy*, 422.
6. Land rented to the United States, to be used temporarily as a camp, is not a *place*, within the terms of the constitution of the United States, over which the United States have "sole and exclusive jurisdiction." *United States v. Tierney*, 571.
7. Within such camp the jurisdiction of the United States would only be such as was necessary for military purposes and required for the enforcement of discipline and the execution of the rules and articles of war. *Ib.*
8. The United States possesses exclusive jurisdiction of places that have been *purchased* by the United States *by consent* of the legislature of the State, for the purpose of erecting a fort, magazine, arsenal, dock-yard, or other needful building. *Ib.*
9. The courts of the United States have no jurisdiction of an offense against section 16 of the act of Congress of 1790, committed in a place where the jurisdiction of the United States is concurrent with that of a State. *Ib.*
10. Under the constitution of the United States and the legislation of Congress, jurisdiction in the enforcement of maritime liens is vested exclusively in the national judiciary. *McAllister v. Steamboat Kirkman*, 369.

See PROCESS; EQUITY; HABEAS CORPUS.

JURY. See INTERNAL REVENUE.

JUSTICE OF THE PEACE. See RECOGNIZANCE.

LAW OF NATIONS. See CONTRABAND OF WAR; COMMERCIAL INTERCOURSE.

LEGACIES. See INTERNAL REVENUE.

Levy—Lien.

LEVY—

1. Where a valid levy was made upon property by a sheriff, and it was wrongfully removed from the place where the sheriff had left it; he had a right to take possession of the same wherever he could find it, if he used no more force in doing so than was absolutely necessary, and all who assisted him are also justified. *Parrish v. Danford*, 345.
2. The execution of a bond of indemnity to a sheriff making a levy, makes the person so executing a trespasser, if the act of the sheriff was illegal. In trespass, all who are liable are liable as principals. *Ib.*

LIABILITY. See PRESUMPTIONS; SURETIES; DEBT AND DEBTOR; RECOGNIZANCE; DAMAGES.

LIEN—

1. A person having a valid maritime lien on a steamboat, who proceeds to enforce it in a State court, and obtains judgment therefor, thereby waives his original lien, and occupies a footing of equality with other creditors having no maritime lien, who also proceeded under the State law. *Stapp v. Steamboat Swallow*, 189.
2. It is well settled that the master of a steamboat or vessel has no lien for wages. *Logan v. Steamboat Æolian*, 267.
3. It does not, however, impair the lien of a pilot for wages, that when the boat or vessel was in port the pilot was recognized and officiated as master. *Ib.*
4. The acceptance of a draft drawn by the clerk of a boat in payment of a claim importing a maritime lien, which draft was never paid, is not a waiver of such lien. *Ib.*
5. The clerk of a steamboat, who has an interest of one-half in the boat, has no lien for wages. *Ib.*
6. The lien of seamen for their wages, being a personal privilege for their protection, is not assignable; and the assignee buying these claims for wages on speculation can have no standing in a court of admiralty. *Ib.*
7. After satisfying the allowed claims for wages out of the proceeds in the registry, the surplus, if any, will be applied *pro rata* to the payment of the other claimants. *Ib.*
8. The clerk of a steamboat has no power to bind the boat for a loan of money without the authority of the master for his acts. *McAllister v. Steamboat Kirkman*, 369.
9. If the clerk procures money on the credit of the boat, without the sanction of the master, and the master directly or impliedly assents to it, it will be regarded as the act of the master, and a lien will be created. *Ib.*
10. A maritime lien is equivalent to an express hypothecation of the boat, and all subsequent transfers or changes of title are subject to

 Lien.

LIEN—Continued.

- this prior and paramount lien; nothing but payment will discharge the boat from its operation. *Ib.*
11. Credits given to a boat in the progress of construction are not liens by the general maritime law. *Ib.*
 12. The purchaser of a boat sold by order of a State court, takes it subject in his hands to any lien or interest existing in favor of other parties prior to his purchase. *Ib.*
 13. An insurance company having paid their quota for the salvage service, and having made advances for the necessary repairs of the boat after being raised, the owners, having no means or credit by which to make the repairs, have a maritime lien at least to the extent of such repairs. *Collins v. Steamboat Fort Wayne*, 476.
 14. A due-bill given by the master in the name of the owners for the amount of such repairs, reciting that they were necessary, and that the advances therefor were on the credit of the boat, is conclusive on the owners, unless impeached for fraud, and constitutes a valid lien. *Ib.*
 15. Claims for wages earned after the boat was repaired, have an equality of lien with that for advances made for repairs. *Ib.*
 16. The *Fort Wayne* having been enrolled at Cincinnati as of that place, and two of the owners residing in the State of Ohio, one of whom was the managing owner, the boat was properly enrolled there, and that was the home port of the boat, although a majority of the owners resided in the State of Pennsylvania, and claimants, therefore, for stores and supplies furnished at Cincinnati, have no lien on the boat therefor. *Ib.*
 17. Debts incurred in building a boat are presumed to be based on the personal credit of the owners, and do not import a maritime lien. And this doctrine is not affected by the fact that such debts are declared to be a lien by the law of the State in which the boat was built. *Ib.*
 18. If the salvage service is rendered under a previous special agreement, fairly made, stipulating for a compensation contingent on the success of the salvor's efforts, it will be recognized in admiralty as creating a valid lien. *Ib.*
 19. But if there are prior lien-holders, not parties to such agreement, they are not concluded as to the amount of compensation agreed to be paid, and a court of admiralty may inquire into the reasonableness of the compensation, and make such allowance as may be equitable. *Ib.*
 20. The lien of seamen for wages earned prior to the accident is not absolutely extinguished thereby, but continues subject to the salvor's lien. *Ib.*

See MATERIAL-MEN; WAIVER; JURISDICTION.

 Lis Pendens—Material-men.

LIS PENDENS—

1. Where an order was issued by the court, requiring a defendant to appear for an examination touching his property, and after the issuing of the same, but prior to his appearance, he executes a chattel mortgage to certain creditors upon a large amount of stocks and bonds, such order of examination was not so far *lis pendens* as to render the mortgage a nullity. *Gregory v. Hewson & Holmes*, 277.
2. The principle that where, at the instance of a judgment creditor, a third person has been cited to answer as to property and effects held by him belonging to the judgment debtor, such notice operates as *lis pendens*, and that the party, from the time of the service of the notice, can make no disposition of the property or effects in his hands, does not apply to the case of a judgment debtor, as to whom there has been a mere order for his examination, without an order restraining him from disposing of his property. *Ib.*

See PLEADING; JURISDICTION.

LOSS. See DAMAGES.

MAIL—

The mail of the United States embraces everything which may by law be transported or conveyed by post. *United States v. Dennis*, 103.

See RECOGNIZANCE; EVIDENCE.

MARSHAL—

1. Where a deputy marshal was regularly appointed by a marshal, and duly sworn as deputy, but no return of such appointment was made by the marshal to the district judge, such omission did not affect the legality of the service of subpoenas made by such deputy, nor deprive him of the right to his fees. *Wintermute v. Smith*, 210.
2. A deputy marshal is not entitled to charge for service or mileage for himself as a witness. *Ib.*
3. Though the service is rendered by the deputy marshal, the fees legally belong to the marshal, and his receipt for them operates as a discharge from liability for such service. *Ib.*
4. A deputy marshal's remedy for compensation is against the marshal for whom he performed the services. *Ib.*

See HABEAS CORPUS; RETURN; SHERIFF.

MASTER. See LIEN.

MATERIAL-MEN—

1. The supplies of material-men to a ship belonging or represented to belong to owners residing in another State, are to be deemed to be furnished on the credit of the ship and the owners until the contrary is proved. *McAllister v. Steamboat Kirkman*, 369.
2. Credit given for supplies furnished a steamboat in her home port is presumed by the maritime law to have been given to the owner or master, and not to the boat. *Ib.*

 Mileage—Oath.

MATERIAL-MEN—Continued.

3. A claim for wages being a lien on the boat, under all circumstances, is an exception to the general rule. Where persons in good faith have given credit to a steamboat for necessary supplies and repairs, as a foreign boat, such persons are not affected by the fraudulent character of sales or transfers by which the boat was placed in the position of a foreign boat. *Ib.*
4. If such persons were apprised of the real nature and character of the transfers, or are fairly chargeable with such knowledge, they must be viewed as participants of the fraud, and can have no claim to any benefit resulting from it. *Ib.*

MILEAGE. See **MARSHAL.**

NEGLIGENCE—

No inference of negligence can be deduced from the fact that a steamboat lying at a wharf has a loaded barge alongside of her. *Mills v. Steamboat Holmes*, 352.

See **FAULT.**

NEUTRALITY—

1. Section 6 of the neutrality act of April 20, 1818, punishing the offenses of beginning or setting on foot, or providing or preparing the means for a military expedition or enterprise for the invasion of a country with which the United States is at peace, is not violated without the commission of an overt or definite act. *United States v. Lumden*, 5.
2. Mere words written or spoken, though indicative of the strongest desire and most determined purpose to do the forbidden acts, will not constitute an offense defined and punished by said section 6. *Ib.*
3. If the means provided were procured to be used on the occurrence of a future contingent event, no liability is incurred under the statute. *Ib.*
4. If the intention is that the means provided shall only be used at a time and under circumstances when they could be used without a violation of law, no criminality attaches to the act. *Ib.*
5. To provide the means for such unlawful expedition or enterprise, implies that such means must be actually furnished and brought together for a criminal purpose. *Ib.*

NEW TRIAL—

The court will not grant a new trial on the ground of newly-discovered evidence, unless satisfied that if a new trial was had a different result would follow. *White v. Arleth*, 319.

NOTICE. See **INDORSEMENT.**

OATH. See **PERJURY; COMMISSIONER.**

Office and Officer—Parties.

OFFICE AND OFFICER—

1. The legislation of Congress prohibits any extra compensation to an officer for services performed, properly pertaining by law to his office. *United States v. Smith*, 68.
2. The act organizing the Territory of Minnesota, made the secretary the disbursing officer of the territorial government, and he can not claim a commission on such disbursements. *Ib.*

See LEVY; CREDITS; SALARY; MARSHAL.

OVERT ACT. See NEUTRALITY.

OWNER. See LIEN; SALVAGE; DAMAGES; JURISDICTION; DEDICATION; AGENCY.

OYER—

1. If, in his declaration, a plaintiff makes profert of the bond declared on, and also a collateral agreement necessary to establish his right to recover on the bond, the defendant may crave oyer of the bond and the collateral agreement. *Hammer v. Klein*, 590.
2. As the legal effect of the profert of the papers, they are presumed to be in court, and the opposing party has a right to know their contents, and oyer will be granted on his application. *Ib.*
3. The right to oyer in a proper case is a part of the common law system of special pleading, which, in a modified form, has obtained in this court from its first organization. *Ib.*

PARDON—

1. The proclamation of the President of the United States, of December 8, 1863, extending amnesty to persons who directly or indirectly participated in rebellion, included within its terms a citizen of the State of Ohio, indicted for treason against the United States. *United States v. Hughes*, 574.
2. A citizen who has complied with the requirements of such proclamation, is not excluded from its protection by a subsequent explanatory proclamation of the President, issued after such compliance, debarring persons in civil custody from its operation. *Ib.*

PARTNERS—

A partner can not, by an agreement to sell a part of his interest, compel his other partner to accept the vendee as a member of the firm. *McNamara v. Gaylord*, 302.

PARTIES—

1. Under section 9 of the act of Congress of February 10, 1855, "to divide the State of Ohio into two judicial districts," which provides "that suits, not of a local nature, shall be brought in the court of the district where the defendant resides; but if there be more than one defendant, and they reside in different districts, the plaintiff may sue in either:" *Held*, that a defendant is one who is a real, and not

 Patents and Patent Law.

PARTIES—Continued.

merely a nominal party to the suit, and who has either directly or indirectly an interest adverse to the claim of the plaintiff, and may be in some way affected by the judgment or decree to be entered. *Sackett's Harbor Bank v. Barry*, 154.

2. Where it appears from the evidence that the names of the seamen are used in the libel as claimants for wages, and that they had assigned their claims, and that the assignee was the sole party in interest, the libel in the names of the seamen will be dismissed. *Logan v. Steamboat Æolian*, 267.
3. Where a collision is the joint act of two steamboats, there can be no objection to the joinder of both as defendants in an action. *Atkinson v. Steamboat Hamilton*, 536.
4. If each boat is charged with a distinct and separate act of collision, without any allegation of privity between them, or concert or unity of purpose, they can not be joined in the same libel. *Id.*

PATENTS AND PATENT LAW—

ABANDONMENT.

1. If the jury are satisfied that the patentee, or the plaintiff as his assignee, has surrendered or abandoned the invention to the public, there can be no recovery for an infringement. *Wayne v. Holmes*, 27.
2. An abandonment or dedication to the public of an invention may be made as well after patent granted as before; but when the patent has actually been granted, it would undoubtedly require a strong case to prove abandonment. *Bell v. Daniels*, 212.

APPLICATION.

3. B. made application for a patent in January, 1838. Some objections were made by the office, and, finally, an amended specification was filed in March, 1840, upon which the patent issued. There was no evidence that the patentee withdrew or abandoned his application of 1838: *Held*, that the two years during which the invention might be used before the application without abandonment, must be dated back from January, 1838. *Bell v. Daniels*, 212.

ASSIGNEE AND ASSIGNMENT.

4. Although inventors only are named in section 17 of the act of 1836, no doubt can be entertained that it extends to and includes the assignees of such inventors. *Jenkins v. Greenwald*, 126.
5. A grant to A. of the exclusive right to make, vend, and use a certain machine within the county of Hamilton, Ohio, conveys the right to make and vend such machines within said county for licensees who intend to use the same without said county; and the manufacture by others of machines within said county for use without, is an infringement of the rights conveyed to A. *Id.*

Patents and Patent Law.

PATENTS AND PATENT LAW—Continued.

6. A paper purporting to be an assignment of an expired patent is void as an assignment, though it may be enforced as a power of attorney. *Bell v. McCullough*, 194.

ATTACHMENT.

7. Whether a defendant, who has been enjoined from infringing a patent by manufacturing or selling the infringing article, continues to sell in his own right, or as the agent of another, he is equally guilty of a contempt, and is liable to attachment. *Potter v. Muller*, 601.

CAVEAT.

8. The effect of a *caveat* is to protect the claim of an inventor from all interfering applications made within one year after its filing, by requiring the office to notify him of such applications, that he may resist the interference if he chooses. But if, during the time which elapses between the filing of his *caveat* and his application, he allows his invention to go into public use, his *caveat* will not protect him. *Bell v. Daniels*, 212.

COMBINATION.

9. There are two classes or kinds of combination recognized by our patent laws which are properly the subject of a patent. *Lee v. Blandy*, 361.
10. The first is one in which all the parts were before known, and where the sole merit of the invention consists in such an arrangement of them as to produce a new and useful result. *Ib.*
11. The second is where some of the parts or elements of the combination are new, and their invention is claimed, but where they are used in combination with parts or elements that were known before. *Ib.*
12. The law is well settled that a patent for a combination of old things, applied to produce a new and useful result, is not violated unless all the parts or elements of the combination are used. *Dodge v. Card*, 393.

CONSTRUCTION OF PATENT.

13. A patentee is not controlled by the title of his patent, but the patent, the specification, and the drawings are all to be examined, and are all to have a fair and liberal construction in determining the nature and extent of the invention. *Bell v. Daniels*, 212.
14. In the construction of a patent, the patentee is not to be confined to the summing-up or "claim," but the specification, the whole specification, and the drawings may be referred to, to ascertain the extent of the claim of the invention, or the proper meaning of expressions used in the "claim." *Morris v. Barrett*, 254.
15. M. claimed "the clamps, 6 6, to prevent end-expansion, and the levers 7 7, working on fixed fulcrums," to prevent the wood from twisting. *Held*, that this was not a claim for the combination of clamps and

 Patents and Patent Law.

 PATENTS AND PATENT LAW—*Continued.*

levers, but for two distinct improvements in the art of bending wood. *Ib.*

16. There can be no question but that there may be a claim for two inventions in the same patent, if they both relate to the same machine; and an action can be sustained for the infringement of either, when they are claimed as separate and distinct. *Lee v. Blandy*, 361.
17. The plaintiff's patent covers all the modes and processes by which the principle of his invention is made operative in practice. *Tilghman v. Werk*, 511.

COSTS.

18. Under section 14 of the patent act of 1836, which provides substantially that where a verdict is rendered for an infringement of a patent right, it shall be competent for the court to render judgment for any sum not exceeding three times the amount of the verdict, as the circumstances of the case may require, with costs, the right of the plaintiff for costs follows from a verdict in his favor for any amount of damage, whether nominal or compensatory, and without any reference to the action of the court in adjudging an increase of damages. *Merchant & Humphrey v. Lewis*, 172.
19. The discretion given to the court by said section was clearly to meet the case of a willful and aggravated violation of a patent right, in which the jury had failed to do full justice to the plaintiffs. *Ib.*
20. Models of the invention described in the plaintiff's patent, and procured by the defendant in good faith, may be included in the taxation of costs, but not other models. *Woodruff v. Barney*, 528.
21. Copies of patents, either that of the plaintiff or others, procured by the defendant, can not be taxed as costs to the plaintiff. *Ib.*

DAMAGES.

22. The object of the provision, which permits the court to treble the verdict found by the jury, is to remunerate patentees who are compelled to sustain their patents against wanton and persevering infringers, and was not intended to include mere collection suits brought upon an expired patent. *Bell v. McCullough*, 194.
23. There is no unbending or unyielding rule of damages, but the rule generally recognized as the true one, is to give, as damages, the amount of profits saved to the defendants by the unlawful use of the plaintiff's invention. *Bell v. Daniels*, 212.
24. The amount which the plaintiff should recover is to be measured by the profit which the defendant has derived from the adoption and use of the plaintiff's invention. *Tilghman v. Werk*, 511.
25. If the jury find the patented improvement is new and original, and that the defendant has infringed, their verdict will be the actual

 Patents and Patent Law.

PATENTS AND PATENT LAW—*Continued.*

- damage which the plaintiff, as assignee of the patent, has sustained by such infringement; and this is to be ascertained by the number of wash-boards made on this principle, and the increased profit to the defendant arising from the use of the invention. *Wayne v. Holmes*, 27.
26. In computing the damages, the jury should exclude from their computations the increased facilities in making wash-boards, due to inventions of machinery since the patent, or its assignment to the plaintiff. *Ib.*
27. The right to recover rests upon the principle that the party complained of has unlawfully appropriated to himself the benefits of an improvement or discovery which belong exclusively to another; and that so far as he has made profit by such appropriation, he is liable to the party injured. This profit is ascertainable by evidence; and does not, like the claim for damages in an action for a tort, rest in the mere discretion of a court or jury. *Jenkins v. Greenwald*, 126.
28. The profits recoverable in an action for a violation of an exclusive right, under a patent, are not regarded as unliquidated damages. *Ib.*
29. The damages for such infringement are the profits of the manufacture. *Ib.*

EVIDENCE.

30. The originality and novelty of the patentee's invention being denied in this case, it is incumbent on the defendant to rebut the presumptions of the patent by proof that it was not the invention of the patentee, or was previously known and in use. *Wayne v. Holmes*, 27.
31. A kind of evidence which is entitled to the highest credibility is the machines themselves, as shown by the models, which, like figures, can not lie. *Morris v. Barrett*, 254.
32. Whether a mere drawing, unaccompanied by any description whatever, can be received as a printed public work, *quære*. *Judson v. Cope*, 327.
33. A certified copy of an assignment from the Patent Office is *prima facie* evidence of the genuineness of the original, and may be read in evidence to the jury. *Lee v. Blandy*, 361.
34. A former license from the plaintiff to the defendant to use the patented machine is evidence of the utility of the invention. *Ib.*

EXPERIMENT.

35. Evidence that others, prior to the date of the patentee's application, have made trials and experiments on the principle of his patent, which were not successfully carried out, will not defeat the patent. *Wayne v. Holmes*, 27.

Patents and Patent Law.

PATENTS AND PATENT LAW—*Continued.*

EXPERTS.

36. The law permits the opinion of men, called experts, to be given in evidence, to determine questions of mechanical difference; and when such men are qualified, and free from bias, their testimony is entitled to great respect. *Morris v. Barrett*, 254.

FOREIGN USE.

37. A prior use in a foreign land does not invalidate a patent afterward taken out in this country, where the patentee, at the time of his application, supposed himself to be the first inventor, unless the prior invention has been patented or described in some printed public work. *Hays v. Sulsor*, 279.
38. It is not competent for a defendant to show use in a foreign country. All that the statute contemplates is proof of the invention as set forth in a patent or printed publication. *Judson v. Cope*, 327.

INFRINGEMENT.

39. There is no infringement of a patent for a combination, unless all the essential parts of the combination are substantially imitated. *Bell v. Daniels*, 212.
40. A mere addition to a patented invention will not justify the use of the invention first patented. *Hays v. Sulsor*, 279.
41. It is familiar law that there is no infringement of a patent for a combination, unless the defendant uses all the parts of which that combination is composed. But there is another kind of combination to which this doctrine does not apply, and that is where the combination is of old and new parts of a machine. In such a case, the defendant infringes if he takes the new part only. *Latta v. Shawk*, 259.
42. On the question of identity, the law regards substance and not form; and the real question is, whether the machine used by the defendants is in *principle* the same as that patented to the plaintiff. *Ib.*
43. By the term "principle" of a machine, we understand its mode or manner of operation, and hence there may be two structures widely different in appearance or dimensions, which are yet identical in principle. *Ib.*
44. If the same result is produced by the defendant as by the patentee, but by means substantially different, there is no infringement, for a patent is not granted for a mere result; but otherwise, if the defendant produces the result by contrivances substantially the same in principle. *Morris v. Barrett*, 254.
45. Upon the issue of infringement, the jury are not to inquire whether the two things are identical in structure, form, or dimensions, but whether they involve substantially the same mechanical principles. *Judson v. Cope*, 327.

Patents and Patent Law.

PATENTS AND PATENT LAW—*Continued.*

46. There is no infringement of a combination of the first class unless the defendant has used all the elements; but the second class may be infringed by the use of a part, if it is new and the invention of the patentee. *Lee v. Blandy*, 361.
47. The patentee is protected against any device which involves substantially the same principle as his own; but if another party produces the same result by means different in principle and application, then it is no infringement, for it would be absurd to say that the granting of a patent covers all possible ways of producing the same result. *Ib.*
48. When the plaintiff's patent was for the combination of a flat, horizontal iron plate in connection with a chamber or recess below the plate, and the defendant put horizontal plates into fire-places already provided with recesses which he had no agency in constructing: *Held*, that the question of infringement was so far doubted as to forbid the granting of an injunction. *Dodge v. Card*, 393.
49. The commissioners of a county are not responsible, in their official capacity for an infringement of a patent right adopted by a contractor for the construction of a county jail. *Jacobs v. Commissioners of Hamilton County*, 500.
50. The gist of the plaintiff's invention is the discovery of a principle in science which he claims to have made practically useful by the process he describes. It is plain that he who adopts that principle, to an available or practical extent, so far invades the exclusive right of the patentee; and to the extent that he has adopted or used the process, is chargeable with infringement. *Tilghman v. Werk*, 511.
51. Hence, where the patentee described a process for the decomposition of fatty matter by the action of water at a high temperature and pressure, so as to dispense with the fourteen per cent. of lime previously used, and the defendant used heated water at a lower temperature and less pressure, and used seven per cent. of lime: *Held*, that this was an infringement of the patent. *Ib.*

INJUNCTION.

52. If the party sued as an infringer admits the infringement, but asserts that, after notice or service of the injunction, he had refrained from the use of the thing patented, and that he will not again infringe, it is no reason why the injunction should not issue or be made perpetual. *Jenkins v. Greenwald*, 126.
53. The complainant, in such a case, is not obliged to rest his interests on the mere asseveration of the party that he will not repeat the act of infringement. Having once been a wrong-doer, the law supposes the possibility of his being so again, and will impose the proper restraint to prevent the repetition of the wrongful act. *Ib.*

Patents and Patent Law.

PATENTS AND PATENT LAW—Continued.

54. It is in accordance with the practice and decisions of the court to refuse a preliminary injunction if, upon the facts presented, there is a fair doubt whether the defendant has infringed. *Dodge v. Card*, 393.
55. The authorities are numerous to support the position, that when such grounds of presumption exist in favor of the novelty of a patented invention, courts will not refuse an injunction, or, if granted, will not dissolve it unless the patent is impeached by the most conclusive evidence. *Hussey v. Whitely*, 407.
56. The fact that a defendant is suffering serious injury from the stoppage of his manufactory, by an injunction, furnishes no reason for a departure from the well-settled rules of chancery practice in patent cases; especially if there be no pretense that he has proceeded in ignorance of the patentee's invention. *Ib.*

LICENSE.

57. If a party obtains a license from a patentee to use his invention, but neglects to pay the price for a long time, and finally, when prosecuted, abandons his license, or while relying upon it, defends also upon other grounds, the license will be forfeited, and he will be liable as an infringer. *Bell v. McCullough*, 194.
58. H. assigned to M. A. & Co. all his right and interest under his patent in twenty-three counties in Ohio, including that in which the defendants' manufactory was carried on. M. A. & Co. were to pay ten dollars for each machine made and sold by them, while H. reserved the right of sending machines of his own manufacture into the territory named in the contract. *Held*, that this paper was not an assignment of the interest of H. in the patent within that territory named, but a mere license. *Hussey v. Whitely*, 407.

NOVELTY.

59. Presumptions of the novelty of a patented invention may arise from some or all of the following grounds: 1. The oath of the patentee that he was the first and original inventor. 2. The action of the Patent Office in granting the patent after full examination. 3. Undisturbed enjoyment of all the benefits of the exclusive rights granted by the patent. 4. Direct adjudications, either at law or in equity, establishing the validity of the patent. 5. Injunctions granted to restrain infringement of the patent. *Hussey v. Whitely*, 407.
60. If the jury find that the improvement patented was not new and original with the patentee, the patent is a nullity. *Wayne v. Holmes*, 27.
61. It is no defense, in an action for the infringement of a combination, to show that the separate elements are old; the proof must go to the novelty of the whole combination as a unit. *Latta v. Shaw*, 259.

 Patents and Patent Law.

PATENTS AND PATENT LAW—Continued.

62. Experiments made by the patentee with an abandoned and unsuccessful machine, invented by another, are no evidence of the want of novelty in an invention subsequently reduced to practice. *Ib.*
63. Upon the issue of novelty, testimony will not be received to show what *might* have been done with prior machines. This is mere speculation, and not fact. *Judson v. Cope*, 327.

PARTICULAR PATENTS.

64. Norcross claimed "the application to circular saw frames of rocker boxes and a swing frame, as herein set forth, and suspending said frame in position by means of the driving belt, as above described for the free and successful operation of the saw by the motion before mentioned." *Held*, that this was a claim for a single combination of rocker boxes, swing frame, and suspension of the frame by the driving belt, and not a claim for two separate improvements. *Lee v. Blandy*, 361.
65. Tilghman's invention consists in a process for manufacturing free fat acids and glycerine, by the action of water, in a liquid state, above the ordinary boiling point of water, and consequently, under pressure, on fatty bodies or substances. *Tilghman v. Werk*, 511.
66. The invention is based on a discovery made by plaintiff that water highly heated and under pressure, *of itself*, possesses a chemical power of decomposing fat bodies into their elements, fat acid and glycerine. *Ib.*

PATENTEE.

67. The patentee has, under his patent, three distinct rights which he may dispose of separately to different individuals. These are: the right to make the machine, the right to use it, and the right to vend it. *Jenkins v. Greenwald*, 126.

PATENT.

68. All exclusive rights in the nature of patents are created, and must be controlled by statutory provisions, and it must appear that all the essential requisites of the law have been complied with. *Latta v. Shawk*, 259.
69. An inventor has no legal rights or immunities under a patent, except such as are conferred by the statute. *Moffitt v. Gaar*, 315.
70. With whatever solemnity or observance of legal form it may have issued, if wanting in any substantial statutory requisite, it is a nullity. *Ib.*

PLEADING.

71. To defeat a patent by showing a prior use of the invention, the statute has expressly provided that notice must be given of the place where and the parties by whom the thing relied on as a defense has been used. The provision is designed to give the patentee the ben-

 Patents and Patent Law.

PATENTS AND PATENT LAW—Continued.

- efft of an examination into the facts of the supposed prior use. *Hays v. Sulzer*, 279.
72. A reference to a county in which, it is alleged, the prior use took place, is not sufficiently definite and explicit, as to place, to fill the requirements of the spirit of the act. *Ib.*
73. The defendant plead the general issue, and gave notice under section 15 of the act of July 4, 1836, attacking the novelty of plaintiff's patent. He also filed special pleas, averring prior use and invention, abandonment, etc. Upon motion the special pleas were stricken out. *Latta v. Shawk*, 259.
74. A notice that a prior machine was used at "Cincinnati," "Covington," "Pittsburg," "Wayne county, Indiana," etc., is not sufficiently specific, and does not lay the foundation for the introduction of proof. *Ib.*
75. The notice of special matter, required under section 15 of the act of 1836, must give the name of some person who had knowledge of the prior use at the place indicated. It is not enough to name the parties using the thing—the notice must state the name of some witness. *Judson v. Cope*, 327.

PRACTICE.

76. If there is no sufficient ground for the allowance of an injunction, and the case is to be viewed as a mere proceeding to recover compensation for an infringement of the exclusive right of the complainant, there would seem to be an adequate remedy at law, which would render the interposition of a court of equity improper. *Jenkins v. Greenwald*, 126.
77. The equity rules adopted by the Supreme Court, under the authority of an act of Congress, are, of course, obligatory on the Circuit Courts. The latter have not the authority to rescind a rule adopted by the Supreme Court for the government of their practice in chancery. *Ib.*
78. In a trial at law, it is not competent to compare prior machines with that used by the defendant. The issues of novelty and infringement are distinct, and the testimony upon the issue of novelty must be confined to a comparison of the prior machines with that of the patentee. *Judson v. Cope*, 327.
79. When H. sold all his right in certain territory, but reserved the right to send machines for sale within the territory, he, by virtue of the right reserved to him, must be viewed as a "party aggrieved" in the words of section 17 of the act of July 4, 1836, and he had an undoubted right to proceed in equity, for the protection of his rights, without joining M., A. & Co. as parties complainant. *Hussey v. Whitely*, 407.

 Patents and Patent Law.

PATENTS AND PATENT LAW—*Continued.*

80. By law, a district judge is associated with a justice of the Supreme Court of the United States in holding a Circuit Court, and may hold that court alone, in the absence of the superior judge; but it would be clearly wrong in a district judge, as a judge of the Circuit Court, in any case, to review or set aside the action of the superior judge. *Ib.*
81. But, if the aspect of the case, as presented to the district judge, is substantially changed by new evidence, which, it may be fairly presumed, if brought to the notice of the presiding judge, would have led to different action, it would be the duty of the former to consider such proof and act in accordance with it. *Ib.*
82. If the defendant upon a motion to dissolve an injunction, so clearly and conclusively impeaches the novelty of the invention of complainant as to leave no doubt on that point, it might be the duty of the court, against all the presumptions in the patentee's favor, to release the defendant from the operation of the injunction. *Ib.*

PRINTED PUBLICATION.

83. The description, in the prior printed publication, should be, in some degree, in the nature of a specification, so far as to enable a mechanic skilled in the art, to construct the machine. It should not be vague reference to, or suggestions of the thing described. *Hays v. Sulzor*, 279.
84. To make the defense of prior publication in a foreign country available, it must appear that the improvement has been so clearly and intelligibly described, in the prior publication, as that the invention could be made or constructed by a competent mechanic. *Judson v. Cope*, 327.
85. Such proof of prior knowledge must be anterior not merely to the date of the patent, but to the time when the invention was actually made. *Ib.*

REISSUE.

86. The surrender of a patent for reissue is equivalent to a distinct admission, made in the most solemn form, that the patent has no validity in the sense of entitling the patentee to an action for its infringement. *Moffitt v. Gaar*, 315.
87. The statute gives no right of action for an infringement occurring under the original and void patent, and before the reissue of the new patent. *Ib.*

SPECIFICATION.

88. The requirement of the statute, in reference to certainty and definiteness in the directions for constructing a machine for which a patent is sought, has in view two distinct objects. The one is, that the public may know precisely what the invention; the other, that is,

 Patents and Patent Law.

PATENTS AND PATENT LAW—Continued.

upon the expiration of the patent, they may have an unerring guide in the specification or record in the Patent Office in the construction of the patented machine. *Wayne v. Holmes*, 27.

89. In a patent for an improvement in the manufacture of wash-boards from wood and metal combined, by sharpening the cutting edges of the zinc, or other metal, and incising the edges by pressure into the frame, it is not a material defect in the specification that it does not give the precise angle of the cutting edge, or describe the mode of applying the pressure, or the depth of the incision. *Ib.*
90. If competent mechanics, skilled in the business, testify there would be no difficulty in constructing the machine from the specification and drawing, the assumption of vagueness and uncertainty in the description is repelled, unless it clearly arises from the language used by the patentee. *Ib.*
91. The description of the invention is required to be full, clear, and exact, that the public may be admonished of the precise claim, that it may not be ignorantly infringed; and that when the exclusive right shall have expired, the public may be at no loss to know what the nature of the invention is, so as to make it valuable and practical. *Judson v. Moore*, 285.
92. If, with the exercise of ordinary intelligence and skill, the invention could be constructed from the information given in the patent, there would be no doubt that the specification answered the requisites of the statute. *Ib.*
93. It is competent for the patentee to embrace two improvements on the same machine in the same patent, and if the defendant has used both or either of the improvements, there is infringement. *Morris v. Barrett*, 254.
94. The description of Tilghman's process in his specification is sufficient. A fixed rule is given, which will certainly insure success, and it is also made known that certain variations may be made without changing the process. *Tilghman v. Werk*, 511.

SUGGESTION.

95. Others may have made suggestions to the patentee as to the possibility of making the improvement subsequently patented; they may have thought upon the subject and made experiments with reference to it, but unless their experiments resulted in discovery, such approaches to invention would be no bar to the granting of a patent to one who succeeded in making the discovery and perfecting it. *Bell v. Daniels*, 212.
96. If A. had a distinct conception of the invention as patented to B. and communicated that knowledge to B., then, in a legal point of view, A. must be considered the first inventor. *Judson v. Moore*, 285.

 Penalty—Perjury.

PATENTS AND PATENT LAW—Continued.

97. Mere conversation, about the practicability of an improvement, or suggestions as to the manner in which it might be carried out or accomplished, will not, of themselves, defeat the claims to originality of him who perfects the idea and secures a patent. *Ib.*
98. But any information to a patentee, sufficient to enable him to construct the thing itself, would destroy the originality of the invention. But that knowledge must be definite and tangible. *Ib.*

UTILITY.

99. The patent raises the presumption of utility, and the jury are not to conclude that there is no utility in an improvement because of its apparent simplicity, nor from the fact that it may not be the best mode of effecting the result. This last consideration would affect the value of the patent, but not its validity. *Bell v. Daniels*, 212.
100. The evidence of the success and practical results of an invention goes more directly to the question of utility, but the jury may take it into consideration, in deciding on the novelty and originality of the invention. *Judson v. Moore*, 285.
101. It is a principle well settled and often recognized that, if the jury find that the defendant has used the invention itself or something substantially like it, he is estopped from denying its utility, for use implies utility. *Hays v. Sulzor*, 279.
102. The superior working of the patented machine, as distinguished from all prior machines, may be evidence of a difference in principle, and is competent testimony upon the issue of novelty. *Judson v. Cope*, 327.
103. The degree of utility is not pertinent to the question of the validity of a patent, but may, perhaps, form a proper subject of inquiry in estimating the *quantum* of injury resulting from the infringement. *Tilghman v. Werk*, 511.

PENALTY—

Where the word penal or penalty is used in a contract, it must be construed as being so intended by the parties; but where a sum named is called liquidated damages, it will be held as a penalty if it seems from the contract that it was so intended by the parties, and the justice of the case requires such a construction. *White v. Arleth*, 319.

PERJURY—

1. To convict of the crime of perjury, under section 13 of the act of Congress of March 3, 1825, it must be shown by evidence that the defendant was sworn; that he was sworn in a case, matter, hearing, or other proceeding, where an oath or affirmation is required to be taken or administered under or by any law or laws of the United

Pleading—Presumptions.

PERJURY—Continued.

States, and that he "knowingly and willingly" swore to that which was false. *United States v. Coons*, 1.

2. Under an indictment for this offense, the prosecution must establish, by proof, that the oath was administered to the defendant by the person named in the indictment; that such person had authority to administer the oath, and that the defendant swore, with a wicked and corrupt intent, willfully false in regard to the matters alleged in the indictment to be untrue. *Ib.*
3. The statements of a defendant, which are made the basis of a charge of perjury, must be disproved by two witnesses, or one witness and corroborating circumstances. *Ib.*

PLEADING—

A plea of a prior suit pending is not sustainable, without the averment and proof that the cases are between the same parties and for the same cause of action. *Thurston v. Steamboat Magnolia*, 93.

See **PARTIES**; **OYER**; **EQUITY**; **RECOGNIZANCE**.

POSTMASTER—

1. Where a postmaster in a quarterly return shows a balance in his hands, the postmaster-general may apply the balance reported in a subsequent return to the extinguishment of the previous balance. *United States v. Kershner*, 432.
2. And where, in an account current continued for years, the postmaster-general thus makes the application of balances reported by a postmaster, any deficiency on final settlement due from the postmaster will be chargeable to and appear in the last quarterly account of the postmaster; and unless two years have elapsed from the return of the last quarterly account to the time of bringing suit on the postmaster's bond, the sureties in the bond are not protected from liability by the provision of the act of Congress requiring suit to be brought within two years, or in case of neglect so to sue, the sureties not to be liable. *Ib.*

POWER OF ATTORNEY. See **AGENCY**.

PRACTICE—

- The Circuit Court of the United States, within the Southern District of Ohio, has adopted, as a rule of practice, the proceeding in aid of execution provided for by the code of Ohio. *Gregory v. Hewson & Holmes*, 277.

See **CONSTRUCTION**; **PATENTS AND PATENT LAW (Practice.)**

PREFERENCE. See **FRAUD**.

PRESUMPTIONS—

1. In a case charging collision by a steamboat on a flat-boat heavily laden, if there is doubt on the question of fault, by reason of a con-

Proceeds—Public Use.

PRESUMPTIONS—Continued.

flict in the evidence, the presumption of wrong will be against the steamboat. *Seaman & Gillespie v. Steamboat Crescent City*, 105.

2. Where damage is done by a boat in motion to one lying at a wharf, the presumption of wrong is against the moving boat, and to avoid liability it must appear that the greatest caution and vigilance were observed. *Mills v. Steamboat Holmes*, 352.

3. Ordinary care under such circumstances will not protect the boat which commits the injury from responsibility. *Ib.*

See EVIDENCE; FRAUD.

PROCEEDS—

The proceeds of the sale of a boat will be ordered to be brought into the registry of the court, to be apportioned among the parties according to their respective interests, as found and adjudged by the court. *Thurston v. Steamboat Magnolia*, 93.

PROCEEDINGS IN AID OF EXECUTION. See PRACTICE; *LIS PENDENS*.

PROCESS—

1. If, in a joint action against two defendants, both residents of another State, brought in an Ohio court, as to one of whom the process is served, and as to the other, returned *not found*, the party served removes the case to the Circuit Court of the United States, pursuant to section 12 of the judiciary act of 1789, the plaintiff is entitled to process from that court against the defendant, who was not made a party in the State court. *Fallis, Brown & Co. v. McArthur & Berry*, 100.
2. In such case, the plaintiff may proceed against the defendant, who has been served with process, as the Circuit Court has jurisdiction under section 1 of the act of February 28, 1839, and may hear and decide the case as against such defendant, without making the other defendant a party to the suit. *Ib.*

PROOF. See FRAUD; CHARACTER; INDICTMENT; DEDICATION; PLEADING; EVIDENCE; PERJURY; EXAMINING COURT.

PROMISSORY NOTES—

The law does not require any particular form of words in the transfer of negotiable paper. Any words which show an intention to transfer a note or bill, without restriction or limitation, will constitute a valid indorsement, and the indorsee, upon non-payment, may resort to the prior parties. *Lee & Co. v. Chillicothe Branch Bank of Ohio*, 387.

See INDORSER; INDORSEMENT.

PUBLIC USE. See DEDICATION.

Purchaser—Road.

PURCHASER. See LIEN; FRAUD; EQUITY.

RATIFICATION. See AGENCY; LIEN.

RECEIVER—

The application for the appointment of a receiver is always addressed to the sound discretion of the court to which it is made. As a general rule, such appointment will be made in all cases where the interests of parties seem to require it. *Crane v. McCoy*, 422.

RECOGNIZANCE—

1. A recognizance is sufficiently certain if it sets out an act punishable by the statute without any of the particulars. *United States v. Dennis*, 103.
2. Where an action of debt was brought on a recognizance, the condition of which was that the defendant should appear "to answer to the charge of stealing from the mail of the United States, contrary to the statute of the United States in such case made and provided: *Held*, that the felonious or criminal character of the act was charged with sufficient certainty. *Ib.*
3. Where a defendant and another person signed a recognizance before a justice of the peace, conditioned for the appearance of the defendant, before the District Court of the United States, to answer to a charge of stealing from the mail; and three days subsequently to said signing, a third person, whose name did not appear in the body of the recognizance, also signed the same: *Held*, that a joint action could not be sustained against all of said persons upon such recognizance, and that it did not, upon its face, import a joint liability on the part of all the signers thereof. *United States v. Pickett*, 123.
4. There is no statutory provision, either of the United States or of the State of Ohio, requiring parties to sign a recognizance. *Ib.*
5. An acknowledgment, without the signatures of the parties, certified by a justice of the peace, is all that is required to make a recognizance valid and obligatory. *Ib.*

REGISTRY OF THE COURT. See PROCEEDS.

REPLEVIN—

Property which has been replevied, does not pass into the possession of the plaintiff after he has given a bond which has been accepted by the officer, until there is a formal delivery of the property by the officer. *Crane v. McCoy*, 422.

See JURISDICTION.

RETURN—

The return of an United States marshal is conclusive of the facts which it sets forth, and its truth can not be collaterally impeached. *Crane v. McCoy*, 422.

ROAD. See DEDICATION.

Salary—Salvage.

SALARY—

1. The defendant, as secretary of Minnesota Territory, having a fixed salary as such, was not entitled to claim, in addition thereto, the salary of governor, during the absence of that officer; as the act organizing the territory made it the duty of the secretary, "in case of the death, removal, resignation, or necessary absence of the governor," to discharge the duties of that office, without any provision for an increase of compensation to the secretary. *United States v. Smith*, 68.
2. The proviso in the second section of the act of September 30, 1850, expressly prohibits the allowance of double salaries in all cases. *Ib.*
3. Where an officer, with a salary payable quarterly, is appointed for four years, "unless sooner removed by the President," and a removal is made during a current quarter, he is not entitled to his salary to the end of the quarter. *Ib.*

See OFFICE AND OFFICER.

SALE. See AGENCY; DAMAGES; PROCEEDS; EQUITY; FRAUD; MATERIAL-MEN; TITLE.

SALVAGE—

1. A salvage service, in raising and preserving a steamboat sunk in the Mississippi river, has a priority of lien over claims for wages earned and supplies furnished before the accident. *Collins v. Steamboat Fort Wayne*, 476.
2. A salvor is favored in law, on the assumption that without his service the *res* might have been wholly lost. *Ib.*
3. The salvage agreement having stipulated for a compensation of twenty-five per cent. on the value of the boat, assumed in the policy of insurance at \$18,000, and it appearing that the actual value did not exceed \$9,000, the sum claimed for salvage is unreasonable, under the circumstances of the case, and subject to reduction by the court. *Ib.*
4. Where a steamboat, on the Ohio river, laden with flour, was sunk by floating ice within a few feet of the shore, and her cargo was saved, at the request of the master of the boat, by fifty or sixty persons on the bank of the river, such service entitles the parties to a decree for salvage. *Spencer v. Steamboat Avery*, 117.
5. It is a well-settled principle of the maritime law, that risk or danger of life is not a necessary element of a salvage service. Where such risk or danger is incurred in saving property from destruction, it will place the salvors in a high position of merit, and entitle them to a more liberal compensation for the service than would otherwise be accorded to them. *Ib.*

Secession—Staleness.

SALVAGE—Continued.

6. The controlling inquiry in salvage cases is, was the property in peril of being lost, and was it saved by the efforts of those claiming to be salvors. *Ib.*
7. The measure of compensation, in salvage cases, depends wholly on the circumstances attending the service. Where there has been great personal exposure and risk, and property has been rescued from inevitable destruction by the intrepidity of the salvors, a liberal allowance will be made. One-half of the value of the property saved has been allowed in such cases. There may be cases where the service is attended with so little difficulty and peril that it would entitle the parties to little more than a *quantum meruit* for work and labor. *Ib.*
8. It is not material whether the salvage service was rendered spontaneously or by request, or whether with or without a previous contract between the owner or his agent and the salvors. *Ib.*
9. Persons who aid in a salvage service, and receive pay therefor from the owners of the property saved, abandon their right as salvors. *Ib.*
10. In a suit for salvage against a boat and cargo, a written instrument of abandonment, signed by the officers of the boat, is admissible in evidence to prove the perilous situation of the vessel. *Blagg v. Steamboat Bicknell*, 270.
11. If a forfeiture of insurance results from a deviation in navigation made for the purpose of rendering a salvage service, it might be legitimately considered in fixing the amount of allowance to the salvors, but where no such consequence has followed, the mere possibility that it might have happened is a contingency too remote and speculative to enter into the computation. *Ib.*

SECESSION. See CONSTITUTIONAL LAW.

SERVICE. See MARSHAL.

SET-OFF—

The rejection of an account or claim against the United States, by an accounting officer of the government authorized by a special act of Congress to adjust the same on equitable principles, does not preclude the defendant, when sued, from setting up such rejected claim or account as a set-off. *United States v. Smith*, 68.

See EVIDENCE; TREASURY DEPARTMENT.

SHERIFF—

The sheriff of a county has no right to disturb, or in any way interfere, with the possession of property legally in the possession of an United States marshal. *Crane v. McCoy*, 422.

See LEVY.

SHIPPER. See FREIGHT.

STALENESS. See EQUITY.

 State Statutes—Territorial Government.

STATE STATUTES. See CONSTRUCTION; ASSIGNMENT; PRACTICE.

STATUTE OF FRAUDS—

1. A judgment was obtained by plaintiff against W., and a levy made on his real property to satisfy the same. H. verbally promised to pay plaintiff the amount of said judgment in six months if he would forbear to collect the judgment against W., and extend the time of the payment of the judgment. *Held*, that such promise by H. was an original and not a collateral promise, and was not required to be in writing within the statute of frauds of the State of Ohio. *Stewart v. Hinkle*, 506.
2. The agreement of the plaintiff was a sufficient consideration for the promise of H. to pay the amount of the judgment. *Ib.*

STATUTE OF LIMITATION. See POSTMASTER.

STEAMBOAT. See COLLISION; DAMAGES; PRESUMPTIONS; SALVAGE; AGENCY; CONTRACT; LIEN; ADMIRALTY; NEGLIGENCE; MATERIAL-MEN; EVIDENCE.

SUITS. See PARTIES; POSTMASTER; CITIZEN.

SUMMONS. See PROCESS.

SURETIES—

1. The sureties upon a bond, wherein the principals have obligated themselves to the United States to open a ship canal three hundred feet in width, and twenty feet in depth, and keep it open the same width and depth for four and a half years from the time of the acceptance of the work by the secretary of war, are discharged from all liability on the same if the principals do not perform their agreement for opening the channel according to its terms, and the government accepts the work with a channel only eighteen feet in depth instead of twenty, as required by the contract. *United States v. Corwine*, 339.
2. A surety is not bound beyond the terms of his contract, and his liability can not be extended or enlarged by implication, and any change in terms, unless expressly assented to by him, releases him from his legal responsibility. *Ib.*

See POSTMASTER.

TERRITORIAL GOVERNMENT—

1. By the organic act of Minnesota Territory, the general government became pledged to defray "the expenses of the legislative assembly the printing of the laws, and other incidental expenses;" and the defendant is entitled to a credit for services rendered, or expenditures made, within the fair scope and meaning of these terms, so far as they did not pertain to the office of secretary of the Territory; but the words, "other incidental expenses," must be restricted to such expenses as were incidental to the legislative assembly and the printing of the laws. *United States v. Smith*, 68.
2. The second section of the act of August 29, 1842, which applies to

 Title—Waiver.

TERRITORIAL GOVERNMENT—Continued.

Territories, then or afterward to be organized, provides that no act of the legislature of a Territory shall be deemed of sufficient authority for a payment by the national treasury, and requires proper vouchers and proof of the same to be exhibited to the accounting officers of the proper department. *Ib.*

TITLE—

1. Whatever may be the character of a transfer of an interest in a steamboat, it vests in the purchaser a legal title in that interest, which those dealing with the boat are justified, in the absence of any knowledge to the contrary, in regarding as *prima facie* valid and unimpeachable. *McAllister v. Steamboat Kirkman*, 369.
2. A collector's office, where bills of sale are made matters of record, is the place where alone it may be presumed persons dealing with a boat would search for information in regard to a title. *Ib.*

See EQUITY; DEDICATION.

TRANSFER. See INDORSEMENT; PROMISSORY NOTES.

TREASON. See CHARGE TO GRAND JURY (p. 699).

TREASURY DEPARTMENT—

In a judicial case involving the accounts of a former secretary of a Territory, in which credits are claimed which have been rejected by the treasury department, the fact that such credits have not been embraced in the estimate required by the organic act of the Territory to be previously made by the secretary of the treasury, does not preclude their allowance by a jury, if not objectionable on other grounds. *United States v. Smith*, 68.

See EVIDENCE.

TRESPASS. See LEVY.

TRUSTS AND TRUSTEES. See EQUITY.

VARIANCE. See INDICTMENT.

VERDICT—

The court will not set aside a verdict on the ground of excessive damages unless the damages are palpably excessive, or, if the action is on a contract, they exceed the legal liability of the defendant under the contract. *White v. Arlet*, 319.

VOUCHER. See TERRITORIAL GOVERNMENT.

VOYAGE. See FREIGHT.

WAGES. See LIEN; MATERIAL-MEN.

WAIVER—

A pilot on a steamboat who assents to an arrangement by which another person agrees to account to him for his wages, does not, by so doing,

War—Witnesses.

WAIVER—Continued.

waive his maritime lien on the boat. *McAllister v. Steamboat Kirkman*, 369.

See SALVAGE; LIEN.

WAR. See COMMERCIAL INTERCOURSE; CONTRABAND OF WAR.

WITNESSES—

1. The words "pursuant to law," in the act of February 26, 1853, are equivalent to the word "summoned," in the act of February 28, 1799, and, in both cases, import that witnesses who attend without being summoned, are voluntary witnesses, whose fees can not be taxed against the losing party. *Woodruff v. Barney*, 528.
2. If a witness, whose residence is not at the place of holding court, is summoned at the place of trial, he is allowed mileage for returning to his home but not for coming to the court; and by a liberal construction of the statute, return travel has been allowed, even beyond the limits of the district for which the court was held. *Ib.*

See PERJURY; MARSHAL.

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